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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 582

CONTINENTAL CASUALTY COMPANY,
and
FIDELITY AND CASUALTY COMPANY OF NEW YORK,
Appellants,

v.

THE ROBERTSON LUMBER COMPANY,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

## JURISDICTIONAL STATEMENT

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THE ROBERTSON LUMBER COMPANY,
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ON APPEAL FROM THE SUPREME COURT OF NORTH DAKOTA

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## JURISDICTIONAL STATEMENT

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This is an appeal by Continental Casualty Company and Fidelity and Casualty Company of New York from a judgment of the Supreme Court of North Dakota, entered on July 3, 1968, affirming the money judgment of the District Court for the County of Grand Forks, North Dakota, against appellants as sureties on payment bonds given pursuant to the Capehart Act, as amended (12 U.S.C. 1748 and 42 U.S.C. 1594), respecting the construction of 744 military housing units on the Grand Forks Air Force Base, Grand Forks, North Dakota. Appellants submit this statement to show the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

## OPINIONS BELOW

The opinion of the Supreme Court of North Dakota is reported at 160 N.W.2d 61. The memorandum opinion of the District Court for the County of Grand Forks, North Dakota is not reported. Both opinions are attached hereto as Appendix A (App. A, 17-51).

## JURISDICTION

Proceedings leading to this appeal were begun by an action in the District Court for Grand Forks County, North Dakota on April 24, 1961 by appellee, The Robertson Lumber Company, against Progressive Contractors, Inc., the eligible builder or prime contractor, and its sureties, Continental Casualty Company and Fidelity and Casualty Company of New York, appellants, to recover for materials furnished during the course of construction by Progressive of the above-mentioned housing units.

Upon stipulation, and order dated May 18, 1961, the case was removed to the United States District Court for the District of North Dakota, Northeastern Division, which, on the 6th day of May, 1964 remanded the action to the District Court for Grand Forks County, North Dakota, because defendant Progressive, had not joined in the stipulation or sought removal (App. C, p. 83).

Following trial January 30, 1967 before the District Court for Grand Forks County upon the record, including the stipulation of facts, the court on March 10, 1967, rendered judgment against appellants for the stipulated amount of Robertson's claim (App. C, p. 94).

On April 26, 1967, appellants duly appealed to the Supreme Court of North Dakota, which affirmed the judgment by order dated July 3, 1968 (App. C, p. 96). Appellants' notice of appeal to this Court was filed in the District Court for Grand Forks County, North Dakota, the court then possessed of the record, on September 4, 1968.

In the course of its opinion and judgment, the Supreme Court of North Dakota invalidated the Capehart Act, as

amended (12 U.S.C. 1748 and 42 U.S.C. 1594), in so far as that Act authorized the Department of Defense and Federal Housing Administration to formulate and to prescribe the form of Capehart payment bonds (App. B, 55-61) executed by appellants; failed to give effect to and actually invalidated the notice provisions and conditions of such bonds; by peculiar construction and application thereof, gave controlling effect to irrelevant North Dakota state statutes, (N.D. Century Code, Sections 22-03-06 and 31-11-05 [23] App. B, 63-64), repugnant to the Capehart Act, as amended, and to the provisions of the bonds promulgated by those federal agencies under the authority of that Act; failed to give res judicata effect to as well as full faith and credit to the final determination of Robertson's claim on the same bonds for the same materials furnished, in a prior federal court action (App. D, 101-111), *Continental Casualty Co. v. U.S. for the use and benefit of The Robertson Lumber Co.*, 8 Cir., 305 F.2d 794 (reversing the judgment below, 196 F.Supp. 171), cert. den. December 3, 1962, No. 444, 371 U.S. 922, and outrightly rejected and contravened the reasoning as well as holding, and negated the result, in that prior action.

By voiding the notice provisions and conditions of the bonds, by altering in 1968 appellants' 1958 bond contracts, in requiring the sureties to prove prejudice from admitted lack of compliance by Robertson with such notice provisions, and in so doing affirming the money judgment against appellants, the Supreme Court of North Dakota deprived appellants of due process of law in contravention of the Due Process Clause, Section 1, of the 14th Amendment to the Constitution of the United States.

The District Court for Grand Forks County, North Dakota was without jurisdiction of the action of Robertson and jurisdiction was fixed exclusively by virtue of the jurisdictional limitations of the applicable Miller Act, 40 U.S.C. 270b(b) in the United States District Court for the District of North Dakota, Northeastern Division.

This Court has jurisdiction to review the decision and judgment of the Supreme Court of North Dakota under the provisions of 28 U.S.C. 1257(1) and 1257(2).

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Supremacy Clause, Art. VI, Clause 2 of the Constitution of the United States; the Due Process Clause Section 1, 14th Amendment to the Constitution; the Capehart Act, as amended, Act of August 11, 1955, 69 Stat. 646 ff. as amended by Act of August 7, 1956, 70 Stat. 1110, 12 U.S.C. 1748 and 42 U.S.C. 1594, pertinent portions of which are printed in App. B hereto attached; 28 U.S.C. 1352; 40 U.S.C. 270; North Dakota Century Code, Sections 22-03-06 and 31-11-05 (23); and Federal Rules of Civil Procedure No. 12(b) and No. 41(b), which are printed in App. B hereto attached.

## QUESTIONS PRESENTED

A. May a state court, in contravention of the Supremacy Clause of the Constitution of the United States, refuse to give validity and enforceability to a federal statute (42 U.S.C. 1594) and the action thereunder of the agencies of the United States (Department of Defense and Federal Housing Administration) prescribing the forms and conditions of payment bonds to be given by eligible builders, as principals, and their sureties pursuant to contracts for military housing under the Capehart Act, as amended, and at the same time uphold and give validity and preemptive enforceability to state statutes (Section 22-03-06 and Section 31-11-05 [23], N.D. Century Code) when (as construed and applied by the State Supreme Court in the instant case) those statutes are repugnant to the Capehart Act and invalidate the conditions of the federal agencies' bonds promulgated under the authority of such Act.

B. Did not the state court fail to give res judicata effect and full faith and credit to a prior federal court final decision and judgment *(Continental Casualty Company v. U.S.*

*for the use and benefit of The Robertson Lumber Company, supra)* upon the same claim and demand by the plaintiff and on the same Capehart payment bonds as are involved in the action out of which this appeal arises, and in which both federal and state court actions the stipulated facts showed a failure by Robertson to give the notices as required by the terms of such bonds?

C. Did not the aforesaid decision and judgment of the Supreme Court, State of North Dakota, also deprive appellant sureties of their property in contravention of the Due Process Clause, Section 1, of the 14th Amendment to the Constitution of the United States, by failing to give effect to the notice conditions of the aforesaid Capehart payment bonds with which Robertson Lumber Company had admittedly not complied?

D. Did not the jurisdictional limitations of the Miller Act apply and deprive the state court of jurisdiction of Robertson's action against appellant sureties on their Capehart payment bonds?

## STATEMENT

### A. *Material Facts*

#### 1. Prior Federal Court Action

On December 11, 1960, Robertson brought an action in the United States District Court for the District of North Dakota, Northeastern Division, against Progressive Contractors, Inc., the eligible builder, and one of its sureties, Continental Casualty Company, to recover on the Capehart payment bonds for the materials furnished in the construction of the aforesaid military housing on Grand Forks Air Force Base, Grand Forks, North Dakota. Jurisdiction was asserted by the plaintiff to be under the Miller Act, 40 U.S.C. 270. Following a stipulation of facts after pretrial conference as well as submission of briefs the matter was submitted to the court for determination of the legal question involved. The factual stipulation was that the notice requirements of the Miller Act under which plaintiff

proceeded had been complied with but that the notice requirements of the payment bonds had not been met. The district court rendered summary judgment on or about May 24, 1961 in favor of Robertson and against Continental holding that Robertson could maintain an action for recovery upon the bonds under the Miller Act and need not comply with the notice provisions of the bonds prescribed under the authority of 42 U.S.C. 1594(a), part of the Capehart Act. *U.S. for the use and benefit of Robertson Lumber Co. v. Progressive Contractors, Inc.*, 196 F.Supp. 171.[1]

Upon appeal by Continental, the United States Circuit Court of Appeals for the Eighth Circuit reversed, under date of June 30, 1966, the judgment of the court below (305 F.2d 794, App. D) holding that the notice provisions of the bonds, with which Robertson admittedly had not complied, governed, and that since under the terms of the bonds compliance therewith was a condition of the right to maintain the action, the complaint should be dismissed. The Court further held that the Department of Defense and Federal Housing Commissioner had the authority under the Capehart Act, as amended, to prescribe the form of the payment bonds; that the notice requirements thereof were valid, could not be ignored, and that the Miller Act notice requirements did not govern. The Court sustained federal jurisdiction of the action under 28 U.S.C. 1352. Robertson's petition for writ of certiorari, No. 444, October term, 1962, was denied by this Court on December 3, 1962, 371 U.S. 922.

2. State Court Action

On April 24, 1961, Robertson brought an action in the District Court for Grand Forks County, North Dakota, against Progressive Contractors, Inc., the eligible builder, Continental Casualty Company and Fidelity and Casualty

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[1] Robertson's two Capehart bond suits were consolidated and treated as one, both in the federal court action and in the later state court action.

Company of New York, sureties on the same Capehart payment bonds as were involved in the federal court action to recover for the same materials furnished on the Grand Forks Air Force Base Capehart military housing construction (App. C, p. 67).

The trial before the court was upon the record and the stipulation of facts (App. C, 83-84) paragraph 6 of which was as follows:

> "That on the 11th day of December, 1960, Plaintiff commenced actions against these defendants for the amounts claimed in these actions in Federal Court for Northeastern Division, District of North Dakota, which complaints were dismissed by the 8th Circuit Court of Appeals in 1962 (Robertson Lumber Co. v. Continental Casualty Company, 305 F.2d 794). The Defendants named and sued and served under the actions in Federal Court were those required to be served under the terms of the bond."

The stipulation also showed that the dual notice requirements of the bond had not been met within the time required under the conditions of the bond (paragraphs 5 and 7 of the stipulation).[2] The state district court rendered a memorandum decision (App. A, 51-54) and made findings of fact, conclusions of law, and entered judgment (App. C, 89-94 against the sureties for the stipulated amount of Robertson's claim, which the Supreme Court of North Dakota affirmed as hereinabove stated.

B. *Stages at Which the Federal Questions Were Raised*

By answer filed on May 18, 1961, and while the action was pending in the federal court upon removal by stipulation, appellants raised the defense that Robertson had failed to comply with the notice provisions of the bonds, which were conditions of the right to maintain the action

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[2]The 90 day notice provision in the bond is the longer. *Ireland's Lumber Company v. Progressive Contractors, et al.*, (N.D.) 122 N.W. 2d 554, 564, 565.

(App. C, p. 71). On February 26, 1963, after this Court on December 3, 1962 denied Robertson's petition for writ of certiorari, the appellants by motion for summary judgment raised the defense of res judicata because of the final determination in the prior federal action (App. C, p. 72). On June 15, 1965, after the decision in *Koppers Co., Inc. v. Continental Casualty Company*, (October 22, 1964), 8 Cir., 337 F.2d 499, appellants raised the question of lack of jurisdiction of the state court to entertain the action because of the exclusive jurisdiction of the federal court under the provisions of the Miller Act (App. C, p. 82).

All such defenses and questions were maintained throughout, were considered on their merits by the District Court for Grand Forks County, North Dakota (App. A, 51-54; and also by the Supreme Court of North Dakota (App. A 17-51.

The question of deprivation of the property of appellant sureties under the Due Process Clause, Section 1 of the 14th Amendment of the Constitution for failing to give effect to and abrogating the notice conditions of the bonds was not raised in the Supreme Court of North Dakota by a petition for rehearing because appellants considered such petition would not have changed the decision and judgment of that Court.

## THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A. The payment bond form, FHA Form No. 2452CP, involved here (App. C, p. 85), was promulgated by the Secretary of Defense pursuant to the authority under a section of the Capehart Act, as amended, 42 U.S.C. 1594(a) for the national military housing program "after numerous meetings attended by representatives of bonding companies, the Department of Defense, the Army, Navy, Air Force, Federal Housing Administration, and interested lending institutions." *Continental Casualty Company v. C. O. Brand, Inc. and Hartford Accident and Indemnity Company*, 5 Cir., 355 F.2d 969, 972, cert. den., October 10, 1966, 385 U.S. 825, one of the latest Capehart bond

cases, fully discussing the history of the Act, of the payment bond forms, and upholding validity of the notice provisions as conditions of the right to maintain suit on the bond. In its lengthy review of the Capehart bond cases, the Supreme Court of North Dakota did not refer to *Brand.*

The bond requires written and timely notice to any two of the following: (1) the principal; (2) any one of the obligees; (3) the surety. The Supreme Court of North Dakota, in that portion of its opinion treating the failure to comply with the notice provisions of the bonds (App. A, p. 45, et seq.) plainly found and said that Robertson's first notice (on July 22, 1960) was a single notice to Progressive, the principal on the bond. The second notices, on April 20, 1961, a few days before the state court suit was brought, were not timely under the terms of the bond. Thus, neither notice complied, said the Supreme Court of North Dakota; nevertheless, the Court, after discussing its holding in *Ireland's Lumber Yard v. Progressive Contractors, et al.*, 122 N.W.2d 554, and referring to a federal district court decision which followed that of the Eighth Circuit in Robertson, *supra* (App. A, p. 50), flatly said:

> "We have not overlooked United States v. Cedric Sanders Company, 233 F.Supp. 435 (D. N.D. N.W. Div. 1963), in which the court dismissed the complaint in an action on a Capehart bond because it showed a failure to have complied with the dual notice provisions of the Capehart bond. This case follows Robertson and holds that such failure precludes a recovery on the bond. It also attempts to distinguish Ireland. We do not agree with this decision. We decided Ireland after Robertson and did not then, nor do we now, accept it as a correct statement of the law that the complaint must be dismissed because the notice provisions of the Capehart bond were not complied with. To require the giving of notice pursuant to the bond terms, as a condition precedent to an action on the bond against the surety when notice is not required to be given to the surety, would be an idle act and the

law does not require the performance of idle acts. Section 31-11-05 (23), N.D.C.C."

Earlier in its opinion (App. A, p. 17, 45, et seq.), the Supreme Court of North Dakota relied on Section 22-03-06 (4) N.D.C.C. (App. B, p. 43), which is not applicable because the Capehart bond notice provisions are not a requirement of the surety but of the United States, acting through its agencies and pursuant to federal statute. Moreover, the Court said (App. A, p. 45) it did not apply the notice provisions of the Miller Act. In the last analysis, by its decision and judgment, succinctly stated in its prepared syllabi Nos. 5 and 6 (App. A, pp. 17-18), the Court simply nullified the notice conditions of the bond and disregarded Robertson's admitted noncomplying notices, holding that under the state statute, as applied by it, the sureties had the burden of showing prejudice from the lack of notice. Since the Court found no such prejudice had been affirmatively shown, it affirmed the judgment against appellants.

Accordingly, it may be seen that the Supreme Court of North Dakota invalidated and negated the federal statute, 42 U.S.C. 1594(a), under which the bond was promulgated by the Secretary of Defense following consultation with all the agencies and interested parties mentioned in *Continental Casualty Co. v. C. O. Brand, et al.*, 355 F.2d 969. Furthermore, the Supreme Court of North Dakota at the same time gave preemptive force and effect to the North Dakota statutes as interpreted and applied by it. Both are in contravention of the Supremacy Clause of the Constitution of the United States (Art. VI, Clause 2).

State law, statutory as well as decisional, may not invalidate, negate or abridge the authority under a law of the United States, the Capehart Act, as amended, conferred upon the agencies of the United States to prescribe the forms of bonds to be executed by contractors and their sureties respecting contracts for the construction of housing for the personnel of the United States on military bases of the United States; nor may such state law be permit-

ted to alter or to invalidate the provisions of such contracts, here the notice provisions and conditions of the bonds, and frustrate the purpose of the national legislation. See *Machinists Association v. Central Airlines*, 374 U.S. 682, 691 et seq., in principle applicable to the national military housing program, which is described in detail in *Anthony P. Miller, Inc. v. U.S.*, 161 Ct.Cl. 455, and in *Continental Casualty Co. v. C. O. Brand, et al., supra*, with particular reference to the active participation and interest of the United States in the program; *Nash v. Florida Industrial Commission*, 389 U.S. 235, 238, 239.

B. The Supreme Court of North Dakota failed to give res judicata effect to and full faith and credit to the final determination of the issues in the prior federal action.

The principle of res judicata prevents relitigation not only of all matters litigated and decided in the prior action, but also of all issues which might have been litigated in the prior action or of any other available matter which might have been presented to sustain or defeat any right or defense which could have been asserted. *Werlein v. New Orleans*, 177 U.S. 390; *United States v. Moser*, 266 U.S. 236; *Grubb v. Public Utilities Commission*, 281 U.S. 479; *Jackson v. Irving Trust Co.*, 311 U.S. 494; *Heiser v. Woodruff*, 327 U.S. 726.

Whether full faith and credit have been given the judgment of a court of the United States by the court of a state presents a substantial federal question. That question exists here. *Werlein v. New Orleans, supra; Pittsburgh C. C. & L. R. Company v. Long Island Loan and Trust Co.*, 172 U.S. 493; *Deposit Bank v. Board of Councilmen of Frankfort*, 191 U.S. 499; *Stoll v. Gottlieb*, 305 U.S. 165; *Toucey v. New York Life Insurance Co.*, 314 U.S. 118; *Angel v. Bullington*, 330 U.S. 183.

The res judicata effect of a final prior federal determination of the case, as well as the requirement of giving full faith and credit thereto, means that under the Supremacy Clause of the Constitution, Robertson, after proceeding to

a conclusion in the federal courts, may not be permitted to start its action all over again in the state court. The Supreme Court of North Dakota in sanctioning such action and in frustrating and reversing the effect of the prior federal action, has not given heed to the judicial power and authority under the Supremacy Clause of the Constitution.

The Supreme Court of North Dakota concluded that the federal action had not been decided on the merits. In *Angel v. Bullington*, 330 U.S. 183, 190, Mr. Justice Frankfurter, speaking for the majority, said:

> "The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a so-called local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' of that claim were adjudicated in the only sense that adjudication of the 'merits' is relevant to the principles of res judicata. A State court cannot sterilize federal claims by putting on the adjudication a local label."

Moreover, when, as in the prior federal action, the facts admitted and stipulated presented the issue upon which the United States Circuit Court of Appeals for the Eighth Circuit held no cause of action existed and that Robertson could not maintain its suit, the determination of that issue was upon the merits. Since that issue was vital to the further pursuit of a recovery on the cause of action involved, further action was barred. All the matters which Robertson later raised in the state court action could and should have been raised in the federal court action. The federal district court opinion in *Robertson* (196 F.Supp. 171) was entered on May 24, 1961, subsequent to the stipulation and submission of briefs. Robertson's untimely notices of April 20, 1961, were simply an attempted bootstrap operation which the Supreme Court of North Dakota disregarded, as it was obliged to do under its *Ireland* decision, *supra*.

The portion of the opinion of the Supreme Court of North Dakota discussing the matter of res judicata (App. A 39 et seq.) inaccurately depicted and postured the federal court action and judgment. The federal district court, in its reported opinion, said that all pertinent facts had been stipulated. A pretrial conference had occurred and briefs were submitted on the legal questions involved. In its opinion, the federal district court further stated it was stipulated and agreed that the notice requirements of the payment bonds had not been met. (Of course, those requirements could not then be met and the Supreme Court of North Dakota held that the April 20, 1961 notices of Robertson were not timely under the terms of the bond.) The federal district court, under Rule 12(b) of the Federal Rules of Civil Procedure, had to treat the questions presented as though upon a motion for summary judgment (App. B, p. 64). The United States Court of Appeals for the Eighth Circuit specifically stated in its opinion that the Court below rendered a summary judgment for Robertson. The Supreme Court of North Dakota was bound to accept such statement. The record before the Supreme Court of North Dakota (App. C, p. 73, excerpt from Robertson's brief in certain interlocutory proceedings in the state court action) showed that summary judgment had been rendered in its favor in the federal court action. The assumption by the Supreme Court of North Dakota (App. A, p. 41) that the federal district court simply entered a pretrial order on a question of law is untenable. Such order would not have been appealable. The further statement of the Supreme Court of North Dakota that the Eighth Circuit merely directed the dismissal of the complaint and did not "direct the entry of a judgment in favor of the defendants" misconceived the nature and scope of the case before that Appellate Court as well as the effect of the dismissal of Robertson's complaint pursuant to the mandate. Such dismissal, under Rule 41(b), last sentence, of the Federal Rules of Civil Procedure, operated as an adjudication upon the merits. By and in its application to this Court for a

writ of certiorari, Robertson recognized the finality of the result, except for the possibility of the intervention of this Court.

The Supreme Court of North Dakota in its opinion made a further inexplicable statement, contrary to the reported opinion in the federal action (App. A, 43):

> "Thus we believe the decision (in Robertson, 305 F.2d 794, App. D) was based on the sole ground that the plaintiff could not recover under the provisions of the Miller Act insofar as the notice requirements were concerned. No effort was made in that case to prove compliance with the notice provisions of the bond. The sole issue was whether the notice provisions of the Miller Act were applicable. Thus it appears the federal court did not decide whether the plaintiff had complied with the notice provisions of the bond or whether compliance with the notice provisions of the bond was a condition precedent to suit on the bond. This has been made an issue in the action now before us and we must determine it on the basis of the record. We find there is no federal adjudication of the issue of whether the plaintiff has complied with the notice requirements of the bond, or whether notice must be given to the surety." (Parenthesis supplied)

The Supreme Court of North Dakota appeared to treat Robertson's contention about timely notice as a fact. (App. A, p. 44) Yet, the Court said, as it was obliged to say under its *Ireland* decision, *supra,* that the April 20, 1961 notices were not timely (App. A, p. 47).

Finally, a close reading of the long and internally inconsistent opinion reveals that the Supreme Court of North Dakota simply "reversed" the opinion and judgment of the United States Circuit Court of Appeals for the Eighth Circuit in the Robertson case, which had long since become final and determinative of the notice issue. That is made clear by the closing paragraph of its opinion, quoted on page 9 hereof.

But the principle of res judicata does not depend upon whether the Supreme Court of North Dakota considered the opinion of the Eighth Circuit to be erroneous. *Deposit Bank v. Board of Councilmen of Frankfort*, 191 U.S. 499.

C. Since the Capehart payment bonds were prepared by the agencies of the United States pursuant to federal statute and are required by the terms of the housing contract for the construction of the military housing units, to which the United States is a party (*U.S. v. Anthony Grace & Sons, Inc.*, 384 U.S. 424; *Anthony P. Miller, Inc. v. U.S.*, 161 Ct.Cl. 455), the decision and judgment of the Supreme Court of North Dakota which altered the terms of such contracts by voiding the notice provisions of the bonds, conditions precedent to maintaining a suit and of the liability of the appellant sureties thereunder, deprived them of their property in contravention of the Due Process Clause, Section 1, of the 14th Amendment to the Constitution of the United States.

D. As the Court said in the *Brand* case, *supra*, (355 F.2d 969, 974), courts have understandably disagreed about the applicability of the Miller Act to Capehart bonds. That Court referred to its earlier decisions to the effect that the jurisdictional provision of the Miller Act, 40 U.S.C. 270(b) applies to Capehart bonds. See also *Continental Casualty Company v. Allsop Lumber Company*, 336 F.2d 445, 451. Thus, it seems to be the prevailing law in the Federal Circuits that while the notice provisions of the bond govern by virtue of the authority given under 42 U.S.C. 1594(a), the jurisdictional provision of the Miller Act, 40 U.S.C. 270b(b), applies respecting the court in which the action may be brought. If those decisions be deemed authoritative, then the state court had no jurisdiction of Robertson's action against appellants under 28 U.S.C. 1352 and Robertson's claim could only have been enforced in an action in the United States District Court for the District of North Dakota, Northeastern Division, where it was originally brought and was finally determined by dismissal of the complaint pursuant to mandate.

## CONCLUSION

It is submitted that the decision and judgment of the Supreme Court of North Dakota should not be permitted to stand and probable jurisdiction in this case should be noted.

Respectfully submitted,

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## APPENDIX A

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

THE ROBERTSON LUMBER COMPANY,
a Corporation, Plaintiff and Respondent

v.

PROGRESSIVE CONTRACTORS, INC.,
a corporation, et al Defendants

CONTINENTAL CASUALTY COMPANY,
a corporation and FIDELITY AND
CASUALTY COMPANY OF NEW YORK,
a corporation Defendants and Appellants

Civil No. 8462

**[Opinion]**

1. Where there is a conflict between decisions of the federal courts on federal questions which have not been passed upon by the Supreme Court of the United States, the state courts are free to decide the questions for themselves.

2. North Dakota district court has jurisdiction in a suit by a claimant against the sureties on a payment bond issued by the sureties on a Capehart housing project (42 U.S.C.A., Sec. 1594, et. seq.), located in the county in which the said court has jurisdiction as provided by the bond terms.

3. The burden of showing former adjudication is upon the one asserting it.

4. A judgment in a former suit between the same parties is not conclusive in a subsequent action where it does not appear that the merits of a controversy were investigated and adjudicated but the former decision merely decided a procedural issue not present in the subsequent action.

5. Where payment bond prescribes notice of claim shall be given within specified period to any two of the follow-

ing: "The Principal, any one of the Obligees, or the sureties" as a condition precedent to suit on the bond by a claimant against the sureties, it does not require any notice be given to the sureties, and where claimant fails to give timely notice to any of the persons named in the bond and brings suit on the bond against the sureties, the sureties are exonerated only to the extent to which they are prejudiced by the omission. Section 22-03-06, N.D.C.C.

6. A surety is exonerated by the omission of a claimant to do anything which it is his obligation to do when required by the surety bond only to the extent to which the surety is prejudiced by such an omission. Section 22-03-06(4), N.D.C.C.

(Syllabus by the Court)

Appeal from District Court of Grand Forks County, the Honorable Hamilton E. Englert, Judge.

JUDGMENT IS AFFIRMED.

Opinion of the Court by Teigen, C. J.

Degnan, McElroy, Lamb & Camrud, Grand Forks, for the Appellants.

Shaft, Benson, Shaft & McConn, Grand Forks, for the Respondent.

* * *

TEIGEN, C. J.

The defendant sureties have appealed from the adverse judgment in a Capehart bond suit brought by a materialman who furnished materials on a housing project authorized under the Capehart Housing Act. The case was tried to the court and demand has been made for trial de novo in this Court.

The plaintiff, Robertson Lumber Company, which is the materialman, instituted this suit against Progressive Contractors, Inc., the prime contractor, and its two payment and performance bond sureties, the Continental Casualty Com-

pany and the Fidelity and Casualty Company of New York, for materials furnished several subcontractors of the prime contractor, for which it had not received payment. The defendant Progressive Contractors, Inc. was the prime contractor for the construction of 744 housing units at the United States Air Force Base, at Grand Forks, North Dakota, authorized under the Capehart Housing Act. The defendant sureties furnished payment and performance bonds as required under the Capehart Housing Act, as amended, 42 U.S.C.A., Sec. 1594(a). The defendant Progressive Contractors, Inc. failed to answer the complaint and judgment has been entered against it by default. The defendant sureties answered setting out several defenses.

When the case came on for trial, the plaintiff and the defendant sureties stipulated the facts. The stipulation of facts admits that the plaintiff furnished the materials described in its complaint and that the value of the unpaid materials furnished was the sum of $13,780.08, and the stipulation provides that if judgment is entered for the plaintiff, it shall be entered for that amount.

It was also stipulated that the defendant Progressive Contractors, Inc. abandoned the building project on May 20, 1960, and notice as required by Sec. 4(a) of the payment and performance bond was sent to the principal alone [Progressive Contractors, Inc.] on July 22, 1960, which was within 90 days of the furnishing of the last materials but that no notice was given to the sureties: It was also stipulated that on April 20, 1961, (more than 90 days after the last materials were furnished) the plaintiff mailed notice as provided by Sec. 4(a) of the bond provisions to the required parties, and that such notices contained the proper information.

The defendant sureties in this appeal raise three principle issues which we must consider: first, jurisdiction over the subject matter; they contend the federal courts have exclusive jurisdiction in suits on Capehart bonds; second, the

matter is res judicata; and, third, failure to give notice in accordance with the bond terms.

Thus, although the case is before us for trial de novo, there is no issue of fact for determination on this appeal. The issues raised are purely questions of law.

## HISTORY

This case and a companion case commenced by the same plaintiff but against Wilshire Contractors, Inc., and Continental Casualty Company, has followed a parallel course through the federal and state courts before this appeal was taken.

The two companion actions were first brought under the Miller Act, as provided by 40 U.S.C.A., Sec. 270(b), in the Federal District Court, Northeastern Division in December of 1960. At a pretrial conference, the facts being stipulated and the contractor having defaulted, the issue between the plaintiff and the defendant sureties was narrowed to a single question of law. The question presented was whether the plaintiff had a right to maintain the actions for recovery upon Capehart payment and performance bonds when the notice requirements of the Miller Act had been complied with, but the notice requirements of the bonds had not been met. The district court rendered its decision in favor of the plaintiff. It held that the plaintiff had a right to sue upon the payment bond if it had complied with the provisions of the Miller Act, 40 U.S.C.A., Secs. 270a-270d, which provides for a single notice. The Capehart bond provisions provided notice requirements as follows:

> "4. No suit or action shall be commenced hereunder by any claimant,
>
> (a) Unless claimant shall have given written notice to any two of the following: The Principal, any one of the Obligees, or the Sureties above named, . . ."

United States v. Progressive Contractors, Inc., 196 F. Supp. 171 (D.C. N.D. 1961).

The opinion of the district court was rendered on May 24, 1961. Prior to that time, to wit: on April 20, 1961, the plaintiff mailed notices, as required by Sec. 4(a) of the bond, to the required parties as provided by the bond provisions. The decision of the federal district court was appealed to the Court of Appeals of the Eighth Circuit, and that court rendered its decision on June 30, 1962. (See Continental Casualty Company v. United States for the use and benefit of Robertson Lumber Company, 305 F.2d 794 (8th Cir. 1962). (*Cert. denied*, 371 U.S. 922, 83 S.Ct. 290, 9 L.Ed.2d 231.) It reversed the federal district court and held that the notice provisions of the Miller Act did not govern in a suit on a Capehart bond. The circuit court ordered the judgment appealed from reversed and the cause was remanded to the district court with directions to dismiss the complaint.

While the federal cases were pending and after due notices had been given on April 20, 1961, the plaintiff commenced separate actions on the claims in the state court. These actions were brought on the bonds under the provisions of 28 U.S.C.A., Sec. 1352, providing concurrent jurisdiction in the state and federal courts. On May 15, 1961, counsel for the plaintiff and counsel for the defendant sureties stipulated ". . . that the above captioned matter shall be and hereby is removed . . . to United States Federal District Court, for the District of North Dakota, Northeastern Division . . . ." Pursuant to the stipulation, the Honorable Ronald N. Davies, Judge of the Federal District Court, ordered that the two cases be removed to the United States Federal Court for the District of North Dakota, Northeastern Division. This order was made on May 18, 1961. On the same date, the defendants Continental Casualty Company and Fidelity and Casualty Company filed their separate answers in federal court. No answer or other responsive pleading has ever been received, served, or filed by either of the defendants Progressive Contractors, Inc., or Wilshire Contractors, Inc.

The defendant sureties filed motions for summary judgments on February 26, 1963. Following oral arguments on said motions and the submission of briefs, Judge Davies, on July 17, 1963, entered his orders denying both motions for summary judgments and directed that both actions be tried in the federal court on the merits.

The issues raised in the motions for summary judgments were the claims that the plaintiff had been non-suited in both cases commenced in federal court under the identical fact situation and therefore, the issues were res judicata. However, the federal district court found that the notice requirements contained in the bonds, as a condition precedent to an action on the bonds, were questions of fact for determination and that if the plaintiff can establish compliance, the actions may be decided on the merits. Thereafter, the above entitled actions came on for pretrial conferences before the Honorable George S. Register, Chief Judge of the United States District Court for North Dakota. Following the pretrial conferences, Judge Register ordered the cases remanded to the state court on the ground the federal court was without jurisdiction. The order was entered on May 6, 1964, and was premised on the ground that the parties may not confer jurisdiction on the federal court by acquiescence in the removal and, in addition, that all the defendants had not been joined in the removal. The stipulation had not been signed by the bond principals although they were named as defendants. Thereafter both cases were tried in state court and judgments were entered in favor of the plaintiff on March 10, 1967. The defendant sureties have taken an appeal to this Court in the action in which Progressive Contractors, Inc., is a defendant. It appears from the files that no appeal was taken from the judgment in the case in which Wilshire Contractors, Inc., is a defendant, but that it was stipulated and agreed between the counsel for the respective parties that the final decision in that case would be governed by the decision of this Court in the case against Progressive Contractors, Inc.

## JURISDICTION

It is the contention of the defendant sureties that a state court has no jurisdiction of the subject matter where suit is brought by a materialman on a Capehart bond. They cite in support thereof the more recent United States Courts of Appeals' decisions, from the Eighth Circuit and the Fifth Circuit, which contradict the language as interpreted in Continental Casualty Company v. Robertson Lumber Company, 305 F.2d 794 (8th Cir. 1962), cert. denied, 371 U.S. 922, 83 S.Ct. 290, 9 L.Ed.2d 231; and United States v. Harrison and Grimshaw Construction Co., 305 F.2d 363 (10th Cir. 1962), *cert. denied*, 371 U.S. 920, 83 S.Ct. 287, 9 L.Ed.2d 229. The later cases cited were heavily relied upon by this Court in its decision in Ireland's Lumber Yard v. Progressive Contractors (N.D. 1963), 122 N.W.2d 554. In the Ireland case this Court determined that the Capehart Bond Act is not controlled by the Miller Act (40 U.S.C.A., Secs. 270a and 270b(b)), and that the state district court had jurisdiction in a suit on a Capehart bond issued by sureties on a Capehart housing project. We also find that other state courts relying on the same authority arrived at the same conclusion. See Minneapolis-Honeywell R. Co. v. Terminal Const. Corp., 41 N.J. 500, 197 A.2d 557 (1964); Allsop Lumber Co. v. Continental Casualty Co., 73 N.M. 64, 385 P.2d 625 (1963); B. C. Richter Contracting Co. v. Continental Casualty Co., 41 Cal.Rptr. 98 (1964); and Robson v. United Pacific Insurance Company (Mo. 1965), 391 S.W.2d 855. In the last cited case it does not appear the question of jurisdiction was raised. However, it is clear that the state court of Missouri exercised jurisdiction in the suit by a subcontractor against the surety on a payment bond furnished under the Capehart Act, Title 42, U.S.C.A., Sec. 1594. We also find that at least one circuit court affirmed the decision of a district court wherein the district court held that an action against a prime contractor and its surety to recover on payment bonds for work and labor performed on Capehart housing projects was not governed by the pro-

cedural provisions of the Miller Act, and that the federal district court had jurisdiction thereon in view of a statute providing that federal district courts shall have original jurisdiction, concurrent with state courts, of any action on a bond executed under any law of the United States, under 28 U.S.C.A., Sec. 1352. See National State Bank of Newark v. Terminal Construction Corporation, 328 F.2d 315 (3rd Cir. 1964), affirming National State Bank of Newark v. Terminal Const. Corp., 217 F.Supp. 341, at 351 (D.C. N.J. 1963). See also Northwest Lumber Sales, Inc. v. S.S. Silberblatt, Inc., 211 F.Supp. 749 (E.D. Mo. 1962).

Paragraph 4 of the payment bond involved in the instant action provides:

> "4. No suit or action shall be commenced hereunder by any claimant,
>
> (a) . . . . .
>
> (b) . . . . .
>
> (c) Other than in a State court of competent jurisdiction in and for the county or other political subdivision of the State in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated and not elsewhere."

Title 42, U.S.C.A., Sec. 1594(a) (Capehart Housing Act), in part, provides:

> "Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section."

Section 270a of Title 40 (Miller Act) provides that performance and payment bonds shall be furnished before any contract, exceeding $2,000.00 in amount, for the construction, alteration, or repair of any public building or public

work of the United States is awarded to any such person and that such bonds shall be furnished to the United States.

Section 270b(b) of Title 40 (Miller Act), provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, . . ."

Section 1352 of Title 28, U.S.C.A., provides:

> "The District Courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States."

The language of the various acts cited above and the bond provisions of the Capehart bonds have been the cause of much confusion in the courts.

We will now discuss the development of case law as it developed in the Eighth Circuit and referred to above as the later cases decided after Robertson.

The first case is that of Continental Casualty Co. v. Allsop Lumber Co., 336 F.2d 445 (8th Cir. 1964). The defendant sureties asserted in their appeal that the district court erred when it concluded that it had jurisdiction of the subject matter under 28 U.S.C.A., Sec. 1352, and that it had jurisdiction of the persons of those defendants who were served outside of the district in which the action was venued. The action was instituted by a subcontractor against the general contractor and surety on a payment bond issued pursuant to the Capehart Housing Act in the Western District of Missouri. Some of the defendants resided in California and service could not be obtained upon them under Missouri law. The federal district court held it had jurisdiction of the subject matter and of the persons. The circuit court, in affirming, found the federal district court had jurisdiction of the subject matter under Title 28 U.S.C.A., Sec. 1352, which we quoted above. It also found that jurisdiction over the individual defendants residing in California was acquired because the district court had extraterritorial jurisdiction for

the purpose of serving the summons. It held that service in accordance with what would have been valid service in an action brought on the Miller Act, was also a valid service in an action on a Capehart bond.

The court concluded, at p. 452, that:

> "If strict logic perforce demands a conclusion that this decision is but another way of saying that Section 270b(b) of the Miller Act has application to a Capehart bond suit, we may be understood as going that far in our present holding."

A footnote states that the foregoing statement is made despite the implications to the contrary in Ireland, supra; Allsop Lumber Company (N.M.), supra; and Minneapolis-Honeywell R. Co. v. Terminal Const. Corp. (N.J.), supra.

The language quoted above was interpreted by the headnote writers of West Publishing Company, Headnote #6, as follows:

> "A Section of Miller Act to effect that every suit under act shall be brought in federal district court has application to Capehart bond suit."

Two months after the Eighth Circuit's decision in Allsop was rendered, they decided Koppers Company v. Continental Casualty Company, 337 F.2d 499 (8th Cir. 1964). Koppers Company, Inc. commenced suit in state court on a Capehart Act payment bond. The defendants removed the action to federal court on the ground that the suit was one on two bonds executed under the law of the United States within the meaning of the bond statute, 28 U.S.C.A., Sec. 1352. They then alleged, among other things, in their answer that the federal district court lacked jurisdiction over the subject matter. The circuit court on review held that the Miller Act provision applied to a suit on a Capehart Act payment bond so as to vest jurisdiction of the action exclusively in the federal court and to deny it to the state court and concluded that because the action had been commenced in state court, the removal thereof gave the federal court only derivative jurisdiction, and the state court lacking juris-

diction in the first instance, it is not brought into being by removal though the federal court would have had jurisdiction had the action originated there. For these reasons it affirmed the district court order dismissing the action.

On the same day that Koppers was handed down, the Eighth Circuit also decided Missouri-Illinois Tractor & Equipment Co. v. D & L Const. Co., 337 F.2d 507 (8th Cir. 1964). In this case the court held that an action on a Capehart Act payment bond brought by a subcontractor-supplier was controlled by the limitations set forth in the Miller Act to one year after the day on which the last labor was performed or material furnished, rather than the period of one year following the date on which the prime contractor ceased work as provided in the bond. In other words, the limitation period provided in the Miller Act governed over the limitation period provided in the Capehard bond.

A review of the four decisions rendered by the Eighth Circuit discloses their holdings to be as follows:

1. The dual notice requirement of a Capehart bond, being more stringent than the notice provisions of the Miller Act, is valid and effective. Continental Casualty Company v. United States, for the use and benefit of Robertson, supra.

2. The proper federal court has jurisdiction under Title 28, U.S.C.A., Sec. 1352, over an action on a Capehart bond. Robertson, supra; Allsop, supra; Koppers, supra; and Missouri-Illinois Tractor & Equipment Co., supra.

3. Section 2(b) of the Miller Act, 40 U.S.C.A., Sec. 270b(b) has application to a Capehart bond action and vests jurisdiction over that action exclusively in the federal court. Koppers, supra; and Missouri-Illinois Tractor & Equipment Co., supra.

4. The limitation period set forth in Section 2(b) of the Miller Act is applicable despite the presence of a

specified longer period in the bond itself. Missouri-Illinois Tractor & Equipment Co., supra.

The Fifth Circuit has also held in two cases that the federal courts have jurisdiction of an action brought on a Capehart housing bond under the Miller Act, although the bonds were not executed under that Act but under the Capehart Act, and that the federal courts also have jurisdiction under the statute providing that district courts have original jurisdiction concurrent with the state courts in an action on a bond executed under any of the laws of the United States. See Lasley v. United States for the use and benefit of Westerman, 285 F.2d 98 (5th Cir. 1960), and Autrey v. Williams and Dunlap, 343 F.2d 730 (5th Cir. 1965).

Standing contrary to the holdings of the circuit courts of the Fifth and Eighth Circuits are two older circuit court decisions; one from the Third Circuit and the other from the Tenth Circuit. The first case is United States v. Harrison and Grimshaw Construction Co., supra, from the Tenth Circuit, which we refer to and quote from in Ireland. The second case is National State Bank of Newark v. Terminal Const. Corp., supra, in which judgment was affirmed without opinion at 328 F.2d 315 (3rd Cir. 1964). This was an action against a prime contractor and its surety to recover on payment bonds for work and labor performed on a Capehart housing project. The district court held, the circuit court affirming, that a Capehart bond is issued under the laws of the United States and the federal district court has jurisdiction thereon in view of the statute providing that the district courts shall have original jurisdiction concurrent with state courts of any action on bonds executed under any law of the United States, as provided by 28 U.S.C.A., Sec. 1352. The court, in analyzing the various statutes, concluded that a bond given under the Capehart Act does not fall within the scope of the Miller Act. We have been unable to find that the question has been passed

upon by the United States Supreme Court and the decisions of the United States Circuit Courts are in conflict.

Where there is a conflict between the decisions of the lower federal courts on federal questions the state courts are generally free to decide the questions for themselves.

> "Decisions of the lower federal courts on federal questions which have not been passed on by the supreme court of the United States should, according to some authorities, be followed by the state courts, although it has also been considered that such decisions, while persuasive, are not binding on the state courts, and a conflict between decisions of the federal courts certainly leaves the state courts free to decide the question for themselves." 21 C.J.S. Courts, Sec. 206, p. 377.

> "On principle, it would seem that where the highest federal authority on a question of federal law is not represented by an opinion of the United States Supreme Court but by a decision of a lower federal court, especially a federal Court of Appeals, a state court should be bound in the same way it is bound by an opinion of the United States Supreme Court. There is, however, a conflict of opinion on this point in the cases. Some seem to be in line with the foregoing proposition. In others the opposite position has been taken by holding that a state court is not bound by decisions of a federal court other than the United States Supreme Court, even though a federal question is involved. And some state courts have carefully refrained from taking any position on the question of their duty to follow on a federal question a decision of a federal court other than the United States Supreme Court." 20 Am.Jur.2d Courts, Sec. 230, p. 560.

This action is brought on a performance and payment bond executed in compliance with Title 42, U.S.C.A., Sec. 1594(a), otherwise known as the Capehart Act. The Capehart Act was passed by Congress in 1955 as Public Law 84-345. It was amended in 1956, Public Law 84-1020, and is now codified as Title 42, U.S.C.A., Sec. 1594.

The purpose of the Capehart Act, its application and history, is well described in Continental Casualty Company v. United States for the use and benefit of Robertson, supra, at pp. 797-798, as follows:

> "The purpose of the Capehart Act was to provide urgently needed housing for military personnel on Government property, and while Capehart housing is undoubtedly 'Government housing,' Capehart construction differs from conventional Government construction in certain significant respects.
>
> "Ordinarily, federal public works are paid for both initially and finally with federal funds. Capehart housing, on the other hand, initially is built and financed by private capital, although loans made by financial institutions to finance the construction are fully insured by the Federal Housing Administration. Both the Department of Defense and the Federal Housing Administration are concerned with the administration of the Capehart program, and the Federal Housing Commissioner has been authorized to promulgate regulations concerning the program, 12 U.S.C.A. Sec. 1748f, which authority has been exercised, see 24 C.F.R. Part 292a.
>
> "The Capehart Act now requires both payment and performance bonds, and standard forms of those bonds have been worked out by the Department of Defense and the Federal Housing Administration, and all Capehart housing contracts call for the giving of those particular bonds, as was done in this case.
>
> "With some allowance for possible over-simplification, a typical Capehart project may be described substantially as follows:
>
> "A building contractor desiring to build Capehart housing and who has been the successful bidder for such housing, and who has made satisfactory arrangements to secure private financing, forms a corporation to take a long term lease on the Government property on which the housing is to be constructed and to execute a mortgage on the leasehold estate to the

financial institution which is to lend the money required for construction purposes. This corporation, which is at all times under complete Government control, does not do the actual building of the housing units. That is done by the contractor under contract with the Government and with the corporation. The functions of the corporation are limited and to some extent nominal. It takes the lease and executes the mortgage and is a party to the construction contract. Further, it is one of the obligees named in the contractor's performance and payment bonds. In the statute, regulations, and contract documents the contractor is called the 'eligible bidder,' the corporation is called the 'mortgagor-builder,' and the lending agency is called the 'mortgagee.'

"As the project is completed, the housing units are turned over to and operated by the Government and are occupied by military personnel. Quarters allowances previously paid to such personnel are retained by the Government and used to pay off the mortgage. When the mortgage is finally retired, the lease to the 'mortgagor-builder' is terminated, and that corporation is dissolved, leaving title to the housing in the Government.

"The contractor derives his profit from doing the actual building of the housing. From the Government's standpoint, advantages are seen in that federal funds are not expended for initial construction and, while the housing will be paid for eventually with federal money, that money would have been expended in any event as quarters allowances for the affected service personnel. In addition, the program may be supposed to provide a stimulus for private industry and capital."

See also United States v. Harrison and Grimshaw Construction Co., supra, at pp. 365-366, for a similar explanation of the Act; it states:

"The Capehart Act amends Title VIII, 'Armed Services Housing Mortgage Insurance,' of the National Housing Act. The purpose of the amendments was to provide 'the most practicable means of coping with the

very serious housing problem * * * facing our military services.' While conceding the advantages of the use of appropriated funds, Congress 'recognized that budgetary consideration would not permit the expenditure in 1 or 2 fiscal years of the sums needed,' and accordingly provided for 'the utilization of private mortgage capital to be repaid from quarters allowances of eligible service personnel.'

"The statutory plan calls for construction by private entities with private funds advanced on the security of mortgages covering the housing to be constructed. The Federal Housing Administration insures the payment of the mortgages. Eligibility for such insurance requires that the mortgaged property be held by a mortgagor approved by the Commissioner of the Housing Administration who may regulate the capital structure and methods of operation and may acquire, for not more than $100, stock or interest in the mortgagor.

"Each housing unit is placed under the control of the Secretary of Defense 'as soon as the unit is available for occupancy as determined by the Commissioner' and when the housing project is completed, the capital stock of the mortgagor, except that held by the Commissioner, is transferred to the Secretary of Defense, who uses appropriations for quarters allowances to pay the mortgage."

The standard form of bonds, approved by the Department of Defense and the Federal Housing Administration, is the form used in the instant action. It provides in part:

"4. No suit or action shall be commenced hereunder by any claimant,

(a) . . . .

(b) . . . .

(c) Other than in a State court of competent jurisdiction in and for the county or other political subdivision of the State in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated and not elsewhere."

The Miller Act was adopted in 1935 and covers Government buildings and works generally. Section 270a of Title 40, U.S.C.A., which is a part of the Miller Act, requires the giving of performance and payment bonds by contractors engaged in the construction, alteration or repair of any "public building or public work of the United States" where the amount of the contract exceeds $2,000.00. Section 270b(b) of Title 40, U.S.C.A., provides:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, . . ."

The original 1955 Capehart Act contained no provision requiring a bond and the Miller Act bond provision was generally applied. However, in 1956, Congress, by amendment of the Capehart Act, provided that a payment and performance bond satisfactory to the Secretary of Defense or his designee was required. The amendment has caused the confusion in the federal courts. However, in our interpretation of the intent of Congress in adopting this amendment, we agree with the statement contained in Continental Casualty Company v. United States for the use and benefit of Robertson, supra, wherein it is stated at pp. 799-800:

> ". . . we are of the opinion that when Congress amended the Capehart Act in 1956 it recognized that Capehart housing is not conventional Government construction, that the private construction and financing of Capehart housing and the joint administration of the Capehart program by the Department of Defense and the Federal Housing Administration presented problems not encountered in ordinary Government construction, and that it intended, as far as bond protection for laborers and material men is concerned, to treat Capehart housing as *sui generis*. While we think that Congress intended that Capehart suppliers should have substantive bond protection essentially similar to that afforded Miller Act suppliers, we think also that Con-

gress intended that the procedural provisions of Capehart bonds should be worked out and prescribed by the two agencies involved in the light of the unique nature of Capehart construction and of the peculiar problems which might be encountered in connection with such construction. In our estimation had Congress intended for the procedural provisions of the Miller Act to apply to Capehart contractors and their sureties it simply would have said so.

"The interpretation which we place upon the 1956 amendment to the Act is in harmony with the administrative interpretation which has been placed upon it by the agencies charged with the implementation of the Capehart program. This is evidenced by the fact that the notice provisions in question, and certain other procedural provisions which differ from the procedural provisions of the Miller Act, were inserted in the bond forms by the agencies themselves. It is settled, of course, that in the case of an ambiguous statute, and the 1956 amendment is ambiguous, the interpretation placed upon it by the agencies charged with its enforcement is entitled to great weight.

"'It may be argued plausibly that there should be general uniformity in the procedure required to be followed by Capehart suppliers on the one hand and Miller Act suppliers on the other. But, bearing in mind the differences between Capehart housing and more familiar types of Government construction, we do not know that absolute procedural uniformity is practicable, just, or desirable. Presumably, the agencies had some valid reason for prescribing dual notice as a condition precedent to action on a Capehart bond, although the record before us does not establish affirmatively what that reason was.

"The view which we take of the case renders it unnecessary for us to pass upon appellant's alternative contention that in any event its liability must be measured by the terms of the bond as written regardless of whether those terms should have been inserted in

the bond. While United States for Use of W. B. Young Supply Co. v. Stewart, 8 Cir., 288 F.187, the principal case cited by appellant in support of its alternative position, may be distinguished from the instant case, and while other relevant authorities appear to be in conflict, the alternative contention is by no means frivolous in the circumstances here present. But, be that as it may, it is to be remembered that the only section of the Miller Act referred to in the Capehart Act is the section which requires the giving of a bond; and when Congress said in the Capehart Act that the giving of a bond satisfactory to the Secretary of Defense or his designee should constitute compliance with the section of the Miller Act which requires that a bond be given, we think that the clear import of the language used was to take Capehart bonds entirely out of the Miller Act."

We also agree with what is said in United States v. Harrison and Grimshaw Construction Co., supra, wherein they stated, at p. 366:

> "We are confronted here with a situation in which the project is built by a private entity with private funds at private risk. The property is encumbered by a mortgage given by a private mortgagor to a private mortgagee."

And, at pp. 367-368:

> "The seriousness of the problem compels us to pursue the question further. We are convinced that in any event Congress did not intend that the Capehart Act performance and payment bonds, and suits thereon, should be governed by the Miller Act.
>
> "The Capehart Act as passed in 1955 contained no provision for a bond. This was added by a 1956 amendment which reads:
>
> 'Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient

compliance with the provisions of section 1 of the Act of August 24, 1935 (49 Stat. 793) [Miller Act], and no additional bonds shall be required under such section.'

"By this amendment Congress recognized the peculiar characteristics of a Capehart Act military housing project. Congress provided for performance and payment bonds with sureties satisfactory to the government and said that the furnishing of such bonds was a sufficient compliance with the Miller Act. It did not say that the provisions of the Miller Act apply to such bonds.

. . . .

". . . Congress realized the unusual situation created by the Capehart Act. The projects are of a private nature until completion and assumption of control by the government. The mortgagor-builder has a contract with a construction company to build the project. The constructor looks to the mortgagor-builder for payment for his work and owes to the mortgagor-builder the obligation to perform. The ownership of $100 worth of stock of the mortgagor-builder by the Commissioner does not make the United States either the owner or the paymaster. A rational approach to the problem requires that an obligee in the performance bond be the entity which owns the project and is in a position to enforce the construction contract.

"Contemporaneous administrative construction aids us in the resolution of any doubts as to the congressional intent. Less than a month after the 1956 amendment became law, the Federal Housing Administration adopted the regulation found at 24 C.F.R. Sec. 292a.27 which, under the heading 'Armed Services Housing Insurance; Eligibility Requirements of Mortgage,' reads:

'Assurance for the completion of a project shall be a performance bond and a payment bond satisfactory to the Commissioner and the Secretary of Defense or his designee with the mortgagor and mortgagee as joint obligees.'

> "The naming of the mortgagor and mortgagee as as joint obligees is a significant departure from a Miller Act bond in which the obligee is the United States and points up the private nature of the project."

And, at pp. 368-369:

> "We are aware of the rule that the Miller Act is to be liberally construed to accomplish its purpose of protecting those who furnish labor and material in the performance of contracts for the construction of public works, but that rule has no application here. We are concerned with a Capehart Act project bond and we are convinced that the Miller Act has no application to such a bond."

Because we do not believe that Congress intended that Capehart bonds shall be governed by the Miller Act, we find jurisdiction in the state court under Section 1352 of Title 28, U.S.C.A., which provides:

> "The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States."

It has often been said that hard cases make bad law. We think this is the situation that arose in the federal court of the Eighth Circuit as reported in Continental Casualty Company v. Allsop Lumber Company, supra, where it was necessary to rule that the federal court had extra-territorial jurisdiction for the purpose of service of a summons upon non-resident defendants. Had a similar situation arisen in North Dakota, we would not have been faced with the same problem under our long-arm rule. See 501 DeMers, Inc. v. Fink (N.D.), 148 N.W.2d 820.

We think a letter presented at the hearings before the House Committee on Banking and Currency, 84th Congress, Second Session, 195-196 (1956) on H.R. 10157, which bill ultimately became a part of Title 42, U.S.C.A., Sec. 1594 (Capehart Housing Act), is of considerable significance although the Eighth Circuit Court apparently did not think so when they decided Koppers, supra. The letter is dated

June 4, 1956, and was from the Director, Legislative Programs, Office of the Assistant Secretary of Defense. It states:

> "*It is also recommended that H.R. 10157 be amended to make it clear that the provisions of the Miller Act (40 U.S.C. 270a) are not applicable to title VIII housing.* It appears more appropriate to provide for use of the FHA dual obligee bond form for both performance and payment bonds. The cost of the FHA bond is substantially less than the cost of bonds required by the Miller Act for public works so that the proposed amendment will serve to decrease the cost of construction and otherwise facilitate contractual relationships. Accordingly, it is suggested that the following amendment be added to the bill:
>
> 'Section 403(a) of the Housing Amendments of 1955 is amended by adding before the final sentence thereof the following: "Any such contract shall provide for the furnishing by the Contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Commissioner and the Secretary of Defense, or their designees, and the furnishing of such bonds shall be deemed sufficient compliance with the provisions of section 1 of the Act of August 24, 1935, and no additional bonds will be required under such section,".'" [Emphasis added.]

Congress must have agreed. It enacted the amendment proposed with only one change (omitted the Commissioner), August 7, 1956, C. 1029, Sec. 507, 70 Stat. 1110. Congressional intent is rarely better documented.

The various conflicting opinions of the lower federal courts, we believe, have brought about a chaotic condition and, thus, in the absence of a United States Supreme Court decision holding that the federal court has exclusive jurisdiction in Capehart bond suits, we adhere to our decision in Ireland in which we held the state court has jurisdiction.

IS THE MATTER RES JUDICATA?

The defendant sureties argued in the trial court, and again in this Court, that the matter is res judicata by virtue of the decision in Continental Casualty Co. v. United States for the use and benefit of Robertson Lumber Company, 305 F.2d 794 (8th Cir. 1962), *cert. denied*, 371 U.S. 922, 83 S.Ct. 290, 9 L.Ed.2d 231.

The affirmative defense of res judicata was not raised by answer as required by Rule 12(b), N.D.R.Civ.P. However, the defense was not available at the time the answer was required but was presented during the trial. It was decided by the trial court. It appears that no objections were made and we must assume the issue was tried by the implied consent of the parties to the action, and therefore must be treated in all respects as if it had been raised in the pleadings. Rule 15(b), N.D.R.Civ.P. This is in harmony with the general rule. 30A Am.Jur. Judgments, Sec. 440.

The state action was commenced in April 1961, while the federal action was pending on appeal in the circuit court. The state action was removed to federal court and after the decision in Robertson, supra, the defendants moved for a summary judgment of dismissal of the state action after removal on the ground that the matter was res judicata. This motion was denied by the federal district judge. Later, the case was returned to state court, as indicated earlier in this opinion, and when the matter came on for trial in the state court the defense of res judicata was again presented by argument and rejected by the state trial judge. The state trial court found the issues in the action were not tried on the merits in the federal court and therefore the matter was not res judicata.

We agree with the decision of the trial court. The first action was commenced in federal court in December 1960. It was brought under the Miller Act. At that time the only decision reaching a circuit court of appeals was that of Lasley v. United States for the use and benefit of Westerman, 285 F.2d 98 (5th Cir. 1960). That case held, in the

alternative, that the federal district court had jurisdiction of the action under the Miller Act, though the bonds were executed under the Capehart Act, and that the district court had jurisdiction also under 28 U.S.C.A., Sec. 1352, providing that district courts have original jurisdiction concurrent with the state courts on a bond executed under any law of the United States. In the pretrial conference in the federal district court, it was admitted by the defendants that the plaintiff was proceeding under the Miller Act, and this is further evidenced by the fact that the action was entitled United States of America for the use and benefit of the Robertson Lumber Company, a corporation, as plaintiff.

At a pretrial conference, the parties submitted, for the determination of the federal district court, a legal question. The question was stipulated into the record as follows:

> "That the question of law involved is whether or not the procedures used by the use-plaintiff which satisfy the requirements of the Miller Act are sufficient to give a right of recovery under the bond."

It was also agreed that there was a failure of notice under the provisions of the bond at the time of the pretrial conference. This stipulation was framed as follows:

> "It is admitted that there is a failure of notice under the provisions of the bond in this case at this time."

Following the pretrial conference, the trial court made its decision. It is reported as United States v. Progressive Contractors, Inc., 196 F.Supp. 171, decided May 24, 1961. The court held the plaintiff had the right to sue these defendants under the Capehart bonds, even though the notice requirements of the bonds had not been met, where the notice requirements of the Miller Act had been complied with. This decision was appealed to the Eighth Circuit Court and decided in Robertson, supra, June 30, 1962. The circuit court reversed the district court and remanded the case, with directions to dismiss the complaint.

In its opinion, the circuit court refers to a summary judgment having been rendered by the district court in favor of this plaintiff. We note that the district court, in its opinion, made no reference to a summary judgment and no summary judgment has been produced in this Court. We think rather that the district court entered a pretrial order on a question of law. However, it is unimportant whether a summary judgment was entered or not, as the circuit court reversed the "judgment appealed from". It did not direct the entry of a judgment in favor of the defendants, however; it merely directed a dismissal of the complaint. In view of the record made in the district court we interpret the circuit court opinion in Robertson as directing a dismissal of the complaint on the ground that it does not state a claim upon which relief can be granted under the Miller Act and is not an adjudication of the issues upon the merits.

We note the federal district court so interpreted Robertson in the same way when it denied a motion for summary judgment in the second case, which was commenced in the state court and removed to the federal court, while the first action was pending in the circuit court. In its order denying the motion for summary judgment made upon the grounds that the issues were res judicata, after the decision in Robertson, the federal district court stated as follows:

> "An action was previously commenced in this Court on the bonds after the Plaintiff had served notice on the Defendants pursuant to the procedural requirements of the Miller Act, 40 U.S.C.A. Secs. 270a-270d. These notices concededly were not in compliance with the notice requirements contained in the bonds.
>
> "This Court held such notice sufficient for the Plaintiff to maintain the action, *United States v. Progressive Contractors, Inc.*, 196 F.Supp. 171; but the Court of Appeals reversed *sub nom, Continental Casualty Company v. United States*, 305 F.2d 794, holding that the procedural provisions of the Miller

Act do not apply to Capehart contracts and their sureties, and that compliance with the notice provisions contained in the bonds is a condition precedent to an action on the bonds. Pursuant to the mandate of the Eighth Circuit, the complaint was then dismissed.

"While the appeal was pending in *United States v. Progressive Contractors, Inc., supra,* the Plaintiff commenced the instant actions in State Court, alleging that written notice had been given the Defendants as required by the notice provisions contained in the bonds. The cases were removed to this Court and, after the decision of the Eighth Circuit in *Continental Casualty Company v. United States,* 305 F.2d 794, the Defendant sureties have moved for summary judgment on the grounds that 'The question raised in the Complaint[s] have been determined and the Plaintiff has been non-suited in both cases under the identical fact situation and therefore the issues here are res adjudicata [sic].'

"The holding in *Continental Casualty Company v. United States, supra,* is that the notice requirements contained in the bonds are a condition precedent to an action on the bonds, and it, therefore, follows that if the Plaintiff can establish compliance, the instant actions may be decided on the merits. Questions of fact for determination are whether the notices were adequate in form and substance, timely, and given to the proper parties."

We also think our finding is supported by what is said in the later Eighth Circuit case of Continental Casualty Co. v. Allsop Lumber Co., 336 F.2d 445, wherein the court stated at p. 451:

"The only issue before this court in Robertson was whether the dual notice provisions of that Capehart bond, which were more stringent than those of the Miller Act, 40 U.S.C. Sec. 270b(a), had to be met in order to bind the surety. We held that those notice provisions governed."

Thus we believe the decision was based on the sole ground that the plaintiff could not recover under the provisions of the Miller Act insofar as the notice requirements were concerned. No effort was made in that case to prove compliance with the notice provisions of the bond. The sole issue was whether the notice provisions of the Miller Act were applicable. Thus it appears the federal court did not decide whether the plaintiff had complied with the notice provisions of the bond or whether compliance with the notice provisions of the bond was a condition precedent to suit on the bond. This has been made an issue in the action now before us and we must determine it on the basis of the record. We find there is no federal adjudication of the issue of whether the plaintiff has complied with the notice requirements of the bond, or whether notice must be given to the surety.

The burden is upon the defendants to establish the defense of res judicata. Knutson v. Ekren, 72 N.D. 118, 5 N.W.2d 74; Borden v. McNamara, 20 N.D. 225, 127 N.W. 104; 30A Am. Jur. Judgments, Sec. 466; 50 C.J.S. Judgments, Sec. 837.

The term "res judicata" means a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction. Knutson v. Ekren, supra.

> "The doctrine of res judicata as stated in many cases is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."
>
> 30A Am.Jur. Judgments, Sec. 324.

The sureties invoked the rule that the doctrine of res judicata covers those things which might have been litigated as well as those that were actually litigated. They cite in

support thereof Phoenix Finance Corporation v. Iowa-Wisconsin B. Co., 115 F.2d 1 (8th Cir.). This is the general rule. See also 30A Am.Jur. Judgments, Sec. 372. However, the rule has its limitations, stated in American Jurisprudence, as follows:

> "This rule applies to every question falling within the purview of the original action, in respect to matters of both claim and defense which could have been presented by the exercise of due diligence."

As we view the decision of the circuit court in Robertson it was not rendered upon the merits but only upon the question of law which it decided to the effect that the more stringent provisions of the Capehart housing bond prevailed over the less stringent notice provisions of the Miller Act and therefore the complaint did not state a claim under the Miller Act. It is also the rule that a decision rendered on any ground which does not involve the merits of the action may not be used as a basis for the operation of the doctrine of res judicata. See 30A Am.Jur. Judgments, Sec. 347. The issue presented at the pretrial conference to the federal district court by the pleadings and the stipulation of facts was purposely limited to show a compliance with the notice provisions of the Miller Act.

Subsequent thereto, and long before the decision in Robertson was rendered, plaintiff contends that proper notice was given under the terms of the Capehart bond as shown by stipulation entered into between the parties to this action on April 12, 1963, and made a part of the record in this case.

> "A judgment on the merits is said to be one which is based on legal rights as distinguished from mere matters of practice, procedure, jurisdiction, or form, or is a judgment that determines, on an issue either of law or fact, which party is right."
>
> 30A Am.Jur. Judgments, Sec. 348.

However,

> "The doctrine of res judicata is not available as a bar to a subsequent action if the judgment in the former action was rendered because of a misconception of the remedy available or of the proper form of proceeding."
>
> 30A Am. Jur. Judgments, Sec. 349

It appears clear that the purpose of the question presented for decision by the federal courts was to determine whether or not the remedy available under the Miller Act was applicable to a Capehart bond. The circuit court held that it was not and ordered the complaint dismissed. It appears to us that the circuit court decision is final in only one respect, and that is, that in a suit on a Capehart bond the more stringent notice provisions of the Capehart bond prevail over the less stringent notice provisions of the Miller Act. The matter was not determined on its merits and we therefore decide it is not res judicata. We will not, however, apply the notice provisions of the Miller Act in our determination of the issues.

## NOTICE AND PREJUDICE

It is the contention of the defendant sureties that even if it is found that the state court has jurisdiction and that the case is not res judicata, nevertheless the plaintiff did not give notice in accordance with the provisions contained in the bond and it is not therefore entitled to recover. This argument is resisted by the plaintiff. Both parties cite Ireland in their arguments.

The defendant sureties contend Ireland is applicable only where the plaintiff gave timely dual notices as provided by the bond conditions, and that if the amount was incorrectly stated in such notices, the sureties will be exonerated to the extent they were prejudiced by the omission.

The plaintiff contends Ireland is applicable in this case because it holds that no notice need be given to the sureties by the claimant to maintain a suit against the sureties.

We believe our holding in Ireland is clear. Syllabus # 5 states the controlling points adjudicated in that case on this question. It states as follows:

> "5. Where payment bond prescribes notice of claim shall be given within specified period to any two of the following: 'The Principal, any one of the Obligees, or the sureties' as a condition precedent to suit on the bond by a claimant against the sureties, it does not require any notice be given to the sureties, and where claimant fails to give timely notice to any of the persons named in the bond and brings suit on the bond against the sureties, the sureties are exonerated only to the extent to which they are prejudiced by the omission. Section 22-03-06, N.D.C.C."

In other words, by this Syllabus, we held as follows:

1. The notice requirements of the bond can be satisfied by giving notice to the principal (the contractor) and the obligees (the mortgagor-builder and the lender) without any notice whatever being given to the surety.
2. That no notice need be given the surety as a condition precedent to suit against the surety on the bond.
3. That where the claimant fails to give timely notice, to anyone, the surety will be exonerated only to the extent to which it is prejudiced by the omission.

In Ireland, dual notices were given within the 90-day period provided by the bond. However, the notice did not comply with the bond requirement that it should state, with substantial accuracy, the amount claimed. In Ireland, a second notice which was not timely included an additional amount claimed for materials furnished which was substantial. Part 4 of the bond provides:

> "4. No suit or action shall be commenced hereunder by any claimant,

> (a) Unless claimant shall have given written notice to any two of the following: The Principal, any one of the Obligees, or the Sureties above named, before the expiration of the period referred to in condition 2 above, stating with substantial accuracy the amount claimed . . ."

In Ireland, the timely notice claimed the amount of $1,677.34 to be due, but in the second notice, which was not timely, an additional charge in the amount of $8,045.69 was added. Thus it is clear the timely notice given did not state the amount with substantial accuracy. Thus the notice provision of the bond in Ireland was not complied with. In Ireland, at page 566, we said:

> ". . . A breach of such an obligation should not release the surety from liability but should exonerate him only to the extent to which he is prejudiced by the failure of the claimant to give the required notice, if any. Section 22-03-06, . . ." [N.D.C.C.]

This section provides that a surety is exonerated only:

> "4. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do."

We find this case and Ireland are quite parallel. In Ireland, timely dual notices were given but did not state the amount with substantial accuracy. In the case before us a single timely notice was given stating the amount with substantial accuracy. Corrected notices were given in both cases which were not timely. Thus in both cases the notice provisions of the bonds were not completely complied with. No fraud or dishonesty is shown in either case. Suit was brought within the one-year period as provided by the bond in both cases. Any obligation placed upon the plaintiff, under the terms of the bond, was not broken until the loss had already occurred in both cases. The indebtedness in each case was fixed and did not increase in amount as the contractor abandoned the project on May 20, 1960, and as a result of the abandonment no further materials were furnished.

In Ireland, we granted a new trial ". . . because the issue on the question of prejudice to the sureties was not litigated in the lower court, . . ." However, the sureties in this case, taking a cue from Ireland, have litigated this issue and introduced evidence in support of it. The defendant Progressive Contractors was a Hayes subsidiary. The record establishes that the defendant Continental Casualty Company had knowledge of the abandonment of this and a number of other Hayes projects in May of 1960. As a result, the defendant Continental assigned five men to investigate its possible exposure. In addition it sent claim men to all of the principal Hayes subsidiary job locations. It also is established that a representative of Continental called at the office of the attorneys for the plaintiff in this case in July 1960, after the project was abandoned. These attorneys gave notice on behalf of the plaintiff to Progressive Contractors on July 22, 1960, which notice, it is stipulated was given within 90 days from the date on which the last materials were furnished. It is clear in this case that the sureties were fully, timely, and substantially advised of the plaintiff's claim. A claimant is defined by the bond terms ". . . as one having direct contract with the Principal or with a subcontractor of the Principal who has furnished labor, material, or both, in the prosecution of the work provided for in the Contract and who has not been paid in full therefor."

The plaintiff's right of action on the bond as a supplier of materials to a subcontractor is not conditioned on giving notice to the bond principal (contractor) as in Miller Act cases. We have examined the evidence in this case and find that it does not support a claim that the sureties were prejudiced by failure to give timely dual notice as provided by the bond terms. They have failed in their burden of proof to show prejudice by any omission of the plaintiff to do anything required by the creditor (plaintiff) which it was its duty to do.

We find no statutory provisions under North Dakota law requiring that notice be given to a surety as a condition

precedent to the commencement of an action on a suretyship bond. We find that the bond itself does not require that notice be given to the surety as a condition precedent to suit. In addition, it appears generally to be the law that in the absence of a statute to the contrary or provisions in the contract so requiring, notice of default need not be given to the sureties before suit.

> "An owner's failure to give notice to the surety of the principal's default does not discharge the surety unless the bond specifically provides for such notice.
>
> "A provision to give notice of default is, of course, valid provided it is reasonable, and is a condition precedent to an action so based. Where no time is specified as to the giving of notice of default, it must be given within a reasonable time under all the circumstances. If, on the other hand, the surety already has knowledge or is chargeable with knowledge of the default, a failure to give the notice required by the bond does not relieve it from liability. Moreover, there is authority that even where the bond requires it, notice of default is unnecessary where the contractor completely abandons the contract."
>
> 17 Am. Jur.2d Contractor's Bonds, Sec. 30, p. 212.

> "Inasmuch as the creditor owes no duty of active diligence to take care of the interest of the surety, his mere failure voluntarily to give information to the surety of the default of the principal cannot have the effect of discharging the surety. The surety is bound to take notice of the principal's default and to perform the obligation. He cannot complain that the creditor has not notified him, in the absence of a special agreement to that effect in the contract of suretyship . . ."
>
> 50 Am. Jur. Suretyship, Sec. 42, p. 933.

> "In the absence of a statute to the contrary or provisions in the contract so requiring, notice of the

default of the principal need not be given to the sureties before they can be sued on the obligations, even though [redacted] rules and by-laws of the obligee require such information to be given to them, or the sureties are injured by lack of it, since it is their duty to make inquiry and ascertain whether the principal is discharging the obligation resting on him . . . ."

72 C.J.S. Principal and Surety, Sec. 253, p. 702.

"Unless there is some agreement as to notice, the creditor is under no duty to the surety to notify the latter of the principal's default. His failure to notify the surety does not result in the latter's discharge. . . ."

Stearns, Law of Suretyship, Sec. 6.1, p. 106.

We have not overlooked *United States v. Cedric Sanders Company*, 223 F.Supp. 435 (D. N.D. N.W. Div. 1963), in which the court dismissed the complaint in an action on a Capehart bond because it showed a failure to have complied with the dual notice provisions of the Capehart bond. This case follows Robertson and hold that such failure precludes a recovery on the bond. It also attempts to distinguish Ireland. We do not agree with this decision. We decided Ireland after Robertson and did not then, nor do we now, accept it as a correct statement of the law that the complaint must be dismissed because the notice provisions of the Capehart bond were not complied with. To require the giving of notice pursuant to the bond terms, as a condition precedent to an action on the bond against the surety when notice is not required to be given to the surety, would be an idle act and the law does not require the performance of idle acts. Section 31-11-05 (23), N.D.C.C.

For the reasons aforesaid, we affirm the judgment.

OBERT C. TEIGEN, C.J.
HARVEY B. KNUDSON
WM. L. PAULSON
RALPH J. ERICKSTAD
ALVIN C. STRUTZ

STATE OF NORTH DAKOTA : IN DISTRICT COURT

COUNTY OF GRAND FORKS : FIRST JUDICIAL DISTRICT

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The Robertson Lumber Company,
a Corporation,

Plaintiff,

v.

Progressive Contractors, Inc.,
a corporation, and Continental
Casualty Company, a corporation
and Fidelity and Casualty Company
of New York, a corporation,

Defendants.

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The Robertson Lumber Company,
a Corporation,

Plaintiff,

v.

Wilshire Contractors, Inc.,
a corporation, and Continental
Casualty Company, a corporation,

Defendants.

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MEMO DECISION

These two cases have been on the court calendar at Grand Forks for sometime, awaiting the outcome of appeals in connection with defendants' efforts to have the cases decided in Federal court, and also since a similar case was in the North Dakota Supreme Court for determination. That case, of Ireland Lumber Yard v. Progressive Contractors

122 NW2d 554, is similar to the issues in these Robertson Lumber Yard cases.

This Court was assigned to hear these cases, which remained on the Grand Forks court calendar after the retirement of Judge Bangs.

During the time that the Ireland Lumber case was being determined in the Supreme Court of the state, the Robertson Lumber Yard cases had been removed to Federal court for trial under a stipulation entered into between the parties for plaintiff and defendants. Copies of the Federal court records are filed with these cases. The Federal court finally decided jurisdiction was in the state court and sent the records back to the clerk of the District Court of Grand Forks County for the trial of the actions. Since that decision by the Federal court, the defendants maintain that later decisions of the Federal courts hold the actions should be properly determined in Federal court.

With reference to the question of jurisdiction in the state courts, counsel for defendants maintains that the trial court should now take "the bull by its horns" and hold that both the State Supreme Court and the Federal Courts were misled by earlier decisions, and that this trial court should hold that it does not now have jurisdiction to hear these cases. Counsel for defendants maintains that the late Federal cases substantiate this viewpoint and that these later holdings definitely indicate that the proper jurisdiction for trial of cases of this type is in the Federal courts.

Counsel for defendants maintain these cases should be dismissed for three reasons. One, that there is no jurisdiction; two, definite prejudice has been shown in alleged improper notice; and, third, that the Robertson cases are res judicata.

Counsel cites several recent Federal decisions that he feels uphold his contention. This Court has studied these cases as set out in a brief. I am of the opinion that this Court,

as a State Court, at least has concurrent jurisdiction to hear and determine a Capehart bond suit. Therefore, I will deny and overrule defendant's motion to dismiss these cases for lack of jurisdiction.

With respect to the question of whether or not the defendants have offered sufficient proof to enable the Court to hold that the sureties were prejudiced by omission of plaintiff to serve notice of claim within a specified period, this Court from the record and evidence must hold that the defendants have failed to establish this contention. It was stipulated that the evidence in the Ireland Lumber case could be used as the evidence in these cases, plus a deposition. It is the opinion of the Court that the plaintiff in each of these two cases is entitled to recover the amounts asked for in these actions; namely, $13,780.08 plus interest in the Progressive action, and $529.18 plus interest in the Wilshire action, as set out in the stipulation dated January 30, 1967.

A further question that came up during the arguments to the Court, was whether or not interest should be allowed if the plaintiffs were to recover in these two cases. I feel, under Section 32-03-04 of the NDCC, that interest is not a discretionary matter, since these are actions to recover the balance due on an account. Therefore, plaintiff will be entitled to interest at the legal rate.

The last point to be decided by the Court is the question of the Robertson cases being res judicata.

Res judicata in these cases to be applicable would be the contention that the matters were heard on the merits and were dismissed in the Federal court, and therefore there is nothing left for the State court to determine. This does not appear to be correct in the thinking of this Court. If the matters were dismissed on the merits upon trial to the Federal court and a verdict rendered in favor of the defendants for a dismissal of their claim, the defendants would have merit in such contention. A study of the record in Federal court does not disclose such situation to exist. Motions

were heard and disposed of in Federal court. Stipulation was entered into between attorneys for plaintiff and attorneys for defendants to transfer the cases to Federal court on the assumption that it was the proper court for trial of this type of claim. The Federal court dismissed the motions and, upon appeal, sustained such dismissals. It was only upon the motions that the Federal court acted. It was not a final hearing on the merits of the claims. Therefore, I will deny this motion of the defendants that the cases be dismissed as being res judicata.

With reference to the question of jurisdiction, the memorandum and order issued on May 6, 1964, by Judge George S. Register in the Robertson Lumber Company actions orders that these cases be remanded to the District Court of Grand Forks County for trial. The reasoning upon which he based this decision was that the cases had been started in 1961 in the State District Court, and that although the Federal court would have original jurisdiction of these cases, to remove them to the Federal court for trial at this late date would create inequities among the litigants, to the detriment of the plaintiff.

I feel that since these cases have proceeded from the time of their filing in 1961 in the State court, up to this time when it comes to this State court for trial that it would be error to hold that I did not have jurisdiction to complete the trials and enter judgments in the cases.

Counsel for plaintiffs may prepare findings of fact, conclusions of law, and order for judgment, accordingly.

Dated this 20th day of February, 1967.

/s/ Hamilton E. Englert
Judge

## APPENDIX B.

Constitutional Provisions, Statutes and Rules Involved.

*Constitution of the United States,* Article VI, Clause 2.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

* * *

14th Amendment, Section 1,

> * * * Nor shall any State deprive any person of life, liberty or property, without due process of law."* * *

UNITED STATES CODE

Title 12 – Banks and Banking

SUBCHAPTER VIII.–ARMED SERVICES HOUSING MORTGAGE INSURANCE

Amendments

1955–Act Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 646, amended subchapter heading, substituting "Armed Services" for "Military" and adding the word "Mortgage."

§ 1748. Definitions.

As used in this subchapter–

(a) The term "mortgage" means a first mortgage on real estate, in fee simple, or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable; or (2) under a lease for a period of not less than fifty years to run from the date the mortgage was executed; and the term "first mortgage" means such classes of first liens as are commonly given to secure advances on, or the unpaid purchase price of, real estate, under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(b) The term "mortgagee" includes the original lender under a mortgage, and his successors and assigns approved by the Commissioner; and the term "mortgagor" includes the original borrower under a mortgage, his successors and assigns.

(c) The term "maturity date" means the date on which the mortgage indebtedness would be extinguished if paid in accordance with periodic payments provided for in the mortgage.

(d) The term "housing accommodations" means housing designed for occupancy by military personnel and their dependents, assigned to duty at or near the military installation where such housing units are constructed.

(e) The term "personnel" shall include military and civilian personnel approved by the Secretary of Defense, or his designee, and the dependents of all such personnel.

(f) The term "military" includes Army, Navy, Marine Corps, Air Force, and Coast Guard.

(g) The term "State" includes the several States, and Puerto Rico, the District of Columbia, Guam, the Virgin Islands, the Canal Zone, and Midway Island. (June 27, 1934, ch. 847 title VIII, § 801, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended July 14, 1952, ch. 723, § 10(a) (2), 66 Stat. 603; Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 646; Aug. 7, 1956, ch. 1029, title V, § 501, 70 Stat. 1109; June 25, 1959, Pub. L. 86-70, § 10(a), 73 Stat. 142; July 12, 1960, Pub. L. 86-624, § 6, 74 Stat. 411.)

**Title 42—The Public Health and Welfare**

**Subchapter XI.—Housing for Military Personnel**

**§ 1594. Contracts for construction.**

**(a) Contract provisions; competitive bids.**

The Secretary of Defense or his designee is authorized to enter into contracts with any eligible bidder to provide for the construction of urgently needed housing on lands

owned or leased by the United States and situated on or near a military reservation or installation for the purpose of providing suitable living accommodations for military personnel of the armed services assigned to duty at the military installation at or in the area where the housing is situated. Any such contract shall provide that each housing unit in the project shall be placed under the control of the Secretary of Defense, or his designee, as soon as the unit is available for occupancy as determined by the Commissioner. Any such contract shall also provide that, except for stock held by the Commissioner, the capital stock of the mortgagor (where the mortgagor is a corporation) be transferred to the Secretary of Defense, or his designee, when the housing has been completed as determined by the Commissioner. Any such contract shall contain such terms and conditions as the Secretary may determine to be necessary to protect the interests of the United States. Any such contract shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense, or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section. Before the Secretary shall enter into any contract as authorized by this section for the construction of housing, he shall invite the submission of competitive bids after advertising in the manner prescribed in section 152 of Title 41.

**(b) Definition of "eligible bidder."**

For the purposes of this subchapter, the term "eligible bidder" means a person, partnership, firm or corporation determined by the Secretary after consultation with the Commissioner (1) to be qualified by experience and financial responsibility to construct housing of the type described in subsection (a) of this section, and (2) to have submitted the lowest acceptable bid.

**(c) Acquisition of capital stock of property covered by mortgage.**

Notwithstanding any other provision of law, the Secretary of Defense or his designee is authorized to acquire the capital stock of mortgagors holding property covered by a mortgage insured under title VIII of the National Housing Act as amended by the Housing Amendments of 1955, and to exercise the rights as holder of such capital stock during the life of such mortgage and, upon the termination of the mortgage, to dissolve the corporation; to guarantee the payment of notes or other legal instruments required by the Commissioner of such mortgagors; to make payments thereon; and to guarantee and indemnify the Armed Services Housing Mortgage Insurance Fund against loss in cases where so required. All housing facilities placed under the control of the Secretary of Defense pursuant to the provisions of this subchapter shall be deemed to be housing facilities under the jurisdiction of the military department to which they are assigned.

* * *

**§ 1748b. Insurance of mortgages.**

**(a) Aggregate amount of insurance; termination date.**

In order to assist in relieving the acute shortage and urgent need for family housing which now exists at or in areas adjacent to military installations because of uncertainty as to the permanency of such installations and to increase the supply of necessary family housing accommodations for personnel at such installations, the Commissioner is authorized, upon application of the mortgagee, to insure mortgages (including advances on such mortgages during construction) which are eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for so insuring such mortgages prior to the date of their execution or disbursement thereon: *Provided*, That the aggregate amount of principle obligations of all mortgages insured under this

subchapter (except mortgages insured pursuant to the provisions of this subchapter in effect prior to August 11, 1955) shall not exceed $2,300,000,000: *And provided further*, That the limitation in section 1715h of this title shall not apply to this subchapter: *And provided further*, That no more mortgages shall be insured under this section after October 1, 1962, except pursuant to a commitment to insure before such date, and not more than twenty-eight thousand family housing units shall be contracted for after June 30, 1959, pursuant to any mortgage insured under this section after such date.

* * *

**§ 1748d. Lease of property; terms and conditions.**

Whenever the Secretary of the Army, Navy, or Air Force determines that it is necessary to lease any land held by the United States on or near a military installation to effectuate the purposes of this subchapter, he may lease such land upon such terms and conditions as will, in his opinion, best serve the national interest. The authority conferred by this section shall be in addition to and not in derogation of any other power or authority of the Secretary of the Army, Navy, or Air Force. (June 27, 1934, ch. 847, title VIII, § 805, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 651.)

* * *

**§ 1748f. Rules and regulations; Special Assistant for Armed Services Housing for Mortgage Insurance.**

The Commissioner is authorized and directed to make such rules and regulations as may be necessary to carry out the provisions of this subchapter. In the performance of, and with respect to, the functions, powers, and duties vested in him by this subchapter, the Commissioner, notwithstanding the provisions of any other law, shall appoint a Special Assistant for Armed Services Housing for Mortgage Insurance, and provide the Special Assistant with adequate

staff, whose whole responsibility will be to expedite operations under this subchapter and to eliminate administrative obstacles to the full utilization of this subchapter under the direction and supervision of the Commissioner. (June 27, 1934, ch. 847, title VIII, § 807, as added Aug. 8, 1949, ch. 403, § 1, 63 Stat. 570, and amended Aug. 11, 1955, ch. 783, title IV, § 401, 69 Stat. 651.)

**§ 1594a. Acquisition of military housing financed under Armed Services Housing Mortgage Insurance Fund and rental housing at military bases.**

* * *

**(f) Use as public quarters or lease of housing.**

Any housing acquired under this section may be (1) assigned as public quarters to military personnel and their dependents; or (2) leased to military and civilian personnel for occupancy by them and their dependents, upon such terms and conditions as will in the judgment of the Secretary of Defense or his designee be in the best interest of the United States, without loss to military personnel of their basic allowance for quarters or appropriate allotments.

* * *

**§ 1594b. Maintenance and operation of housing; use of quarters; payment of principal, interest, and other obligations.**

The Secretary of Defense or his designee is authorized to maintain and operate any housing acquired under this subchapter and assign quarters therein to military and civilian personnel and their dependents. Appropriations for quarters allowances or appropriate allotments, and rental charges to civilian personnel, may be utilized by the military department concerned for the payment of principal, interest, and other obligations, except those of maintenance and operation, of the mortgagor corporation with respect to such housing projects. Such payments shall not exceed an average of $90 a month per housing unit and total payments for all housing so acquired shall not exceed

$21,000,000 per month: *Provided,* That, in case of the United States Coast Guard, total payments for all housing so acquired shall not exceed $90,000 per month. (Aug. 11, 1955, ch. 783, title IV, § 405, 69 Stat. 653; Aug. 7, 1956, ch. 1029, title V, § 508, 70 Stat. 1110.)

**Title 28—Judiciary and Judicial Procedure**

§ 1352. Bonds executed under federal law.

The district courts shall have original jurisdiction, concurrent with State courts, of any action on a bond executed under any law of the United States. (June 25, 1948, ch. 646, 62 Stat. 934.)

Title 40—Public Buildings, Property, and Works

§ 270a. Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.

(a) Before any contract exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract

shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, ch. 642, § 1, 49 Stat. 793.)

§ 270b. Same; rights of persons furnishing labor or material.

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or per-

formed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit. (Aug. 24, 1935, ch. 642, § 2, 49 Stat. 794; Aug. 4, 1959, Pub. L. 86-135, § 1, 73 Stat. 279.)

**North Dakota Century Code (1960)**

22-03-06. **Exoneration of surety—Methods.**—A surety is exonerated:

1. In like manner with a guarantor;
2. By performance of the principal obligation or tender of such performance duly made as provided in this code;
3. To the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or

4. To the extent to which he is prejudiced by an omission of the creditor to do anything when required by the surety which it is his duty to do.

**31-11-05. Maxims of jurisprudence—How to be used and applied—List.**—The maxims of jurisprudence set forth in this section are not intended to qualify any of the provisions of the laws of this state, but to aid in their just application:

* * *

23. The law neither does nor requires idle acts;

* * *

**Federal Rules of Civil Procedures**

**Rule 12.** Defense and Objections—When and How Presented—By Pleading in Motion—Motion for Judgment in the Pleadings

* * *

**(b) How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be

granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

**Rule 41.** Dismissal of Actions

* * *

**(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

## APPENDIX C

Filed: May 18, 1961

STATE OF NORTH DAKOTA — IN DISTRICT COURT
COUNTY OF GRAND FORKS — FIRST JUDICIAL DISTRICT

The Robertson Lumber Company, a corporation,

Plaintiff,

v.

Civil No. 3883

Progressive Contractors, Inc., a corporation; Continental Casualty Company, a corporation; and Fidelity and Casualty Company of New York, a corporation,

Defendants

### COMPLAINT

Comes now the plaintiff in the above-entitled action and for its cause of action against the defendants alleges as follows:

1. That plaintiff is a corporation duly organized and existing under the laws of the State of North Dakota.

2. That the defendants, Progressive Contractors, Inc., Continental Casualty Company, and Fidelity and Casualty Company of New York, are foreign corporations.

3. That on or about the 1st day of August, 1958, the defendant Progressive Contractors, Inc., a corporation, entered into a contract or contracts with the United States of America and various Grand Forks Air Force Base Housing Corporations for the furnishing of materials and labor and for the construction of 744 housing units at the Grand Forks Air Force Base, which contract is designated as AF 32(605)-22, Armed Services Housing Project.

4. That on or about the 8th day of August, 1958, in compliance with the requirements of the Capehart Housing Act, the defendant, Progressive Contractors, Inc., a corporation, as Principal, and the defendants Continental Casualty Company and Fidelity and Casualty Company of New York, as Sureties A and B, executed and delivered certain payment bonds conditioned among other things that if the principal should promptly make a payment to all claimants for all labor and material furnished in the prosecution of the work provided for in the contracts, the said bonds should be null and void, but that otherwise any claimants should have a direct right of action under said bonds for any and all labor and material furnished in the prosecution of the work provided for in the contract and who has not been paid in full therefor; that said bonds define a claimant as one having a direct contract with the Principal or with a subcontractor of the principal who has furnished labor, material or both, in the prosecution of the work provided for in the contracts; that said bonds are described as follows:

1. F.H.A. form No. 2452CP, Revised May, 1957 Project No. 094-81001-Air No. 1, Bond No. 15-1748, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing, Inc. as mortgagor-builder, The Provident Institution for Savings in the Town of Boston as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $2,049,600.00.

2. F.H.A. Form No. 2452CP, Revised May, 1957, Project No. 094-81002-Air No. 2, Bond No. 15-1745, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Two, Inc. as Mortgagor-builder, Manufacturers Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $1,835,000.00.

3. F.H.A. Form No. 2452CP, Revised May, 1957, Project No. 094-81009-Air No. 9, Bond No. 15-

1746, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Three, Inc. as mortgagor-builder, Manufacturer's Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $2,072,700.00.

4. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81010-Air No. 10, Bond No. 15-1746, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Four, Inc., as mortgagor-builder, Manufacturers Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $1,233,200.00.

5. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81011-Air No. 11, Bond No. 15-1747, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Five, Inc., as mortgagor-builder, Manufacturers Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $2,030,200.00.

6. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81012-Air No. 12, Bond No. 15-1750, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Six, Inc., as mortgagor-builder, The Provident Institution for Savings in the Town of Boston, as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $1,963,000.00.

7. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81016-Air No. 16, Bond No. 15-1749, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Seven, Inc. as mortgagor-builder, Manufacturers Trust Company of New York as lender, and Continental Casualty Company

and Fidelity and Casualty Company of New York, as Sureties, dated August 25, 1958, in the amount of $887,400.00.

5. That thereafter the plaintiff entered into continuing contracts with certain corporations called Cemaco, Inc., Dakota Lumber Company, Howard Chace Tile Co., Ikart Construction Co., Gatho, Inc., Archer Painting Co., Na Mar Builders, Inc. and Lanat, Inc., wherein the plaintiff agreed and did furnish to said corporations certain materials required by said corporations; that the plaintiff has fully performed all of the terms of these contracts but that said corporations and the defendant, Progressive Contractors, Inc., have failed to pay the full amount due and payable under said contracts; that all of said materials were accepted by said corporations and the defendant Progressive Contractors, Inc., and that the total balance remaining due under said contracts is Fifteen Thousand Three Hundred Ninety-eight and 83/100 Dollars ($15,398.83) with interest thereon at the legal rate, which sum the defendant, Progressive Contractors, Inc. and said corporations have failed, neglected and refused to pay.

6. That said corporations, Cemaco, Inc., Dakota Lumber Company, Howard Chace Tile Co., Ikart Construction Co., Gatho, Inc., Archer Painting Co., Na Mar Builders, Inc. and Lanat, Inc., are subcontractors of the defendant, Progressive Contractors, Inc.

7. That prior to the commencement of this action, the plaintiff gave written notice to the defendants that plaintiff had supplied materials to the partial construction of the 744 housing units previously described, all as provided under the terms of the previously described bonds.

WHEREFORE plaintiff prays for judgment against the defendants jointly and severally in the sum of Fifteen Thousand Three Hundred Ninety-eight and 83/100 Dollars ($15,398.83) with interest thereon at the legal rate and its costs and disbursements herein.

Dated this 24th day of April, 1961.

JOHN G. SHAFT
of Shaft, Benson & Shaft
310 Security Building
Grand Forks, North Dakota
*Attorneys for Plaintiff*

---

[Caption omitted in printing]

[Filed May 18, 1961]

## STIPULATION FOR REMOVAL TO FEDERAL COURT

It is hereby stipulated by and between the Plaintiff in the above captioned matter, Robertson Lumber Company, a corporation, acting by and through its Atttorney, John G. Shaft, and the Defendants, Continental Casualty Company and Fidelity and Casualty Company of New York, acting by and through their Attorney, James L. Lamb that the above captioned matter shall be and hereby is removed from District Court, First Judicial District, State of North Dakota, to United States Federal District Court, for the District of North Dakota, Northeastern Division, and that attached hereto are copies of the complaint, which allege the pre-requisites for jurisdiction in the Federal Court.

Dated this 15 day of May, 1961.

JOHN G. SHAFT
For: Shaft, Benson & Shaft
310 Security Building
Grand Forks, North Dakota
*Attorneys for Plaintiff*

JAMES L. LAMB
For: Degnan, Hager, McElroy & Lamb
201 Red River National Bank Building
Grand Forks, North Dakota
*Attorneys for Defendants*

ORDER

Pursuant to the above stipulation, IT IS HEREBY ORDERED that the above captioned matter shall be and hereby is removed to the United States Federal Court for the District of North Dakota, Northeastern Division.

Dated this 18th day of May, 1961.

/s/ RONALD N. DAVIES
*Judge, Federal District Court*

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[Caption omitted in printing]

SEPARATE ANSWER OF CONTINENTAL COMPANY AND FIDELITY AND CASUALTY COMPANY OF NEW YORK
Filed May 18, 1961

The Defendants, Continental Casualty Company and Fidelity and Casualty Company of New York, for their separate answer to Plaintiff's Complaint allege as follows:

FIRST DEFENSE

That these answering Defendants admit the allegations contained in Paragraph 1, 2, 3, and 4 of the Complaint, that they are without sufficient information so as to form a belief as to the allegations contained in Paragraph 5 of the Complaint and so deny same, and deny each and every other allegation contained in the Complaint.

SECOND DEFENSE

That the Complaint fails to state a claim against these answering Defendants upon which relief may be granted.

THIRD DEFENSE

That the bonds alleged in the Complaint contain certain notice requirements, which are conditions precedent to bringing suit thereunder against these Defendants, and, as these requirements have not been complied with, no action can be maintained against these Defendants.

FOURTH DEFENSE

That the Plaintiff is not one within the definition of claimant under the terms of the bonds as alleged in the Complaint.

WHEREFORE, this answering Defendant prays that it be awarded judgment dismissing Plaintiff's Complaint and for its costs and disbursements herein.

Dated this 15 day of May, 1961.

JAMES L. LAMB
For: Degnan, Hager, McElroy & Lamb
201 Red River National Bank Building
Grand Forks, North Dakota
*Attorneys for Defendants*

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[Caption omitted in printing]

MOTION FOR SUMMARY JUDGMENT
Civil No. 3883
Filed February 26, 1963

The Defendants Continental Casualty Company and Fidelity and Casualty Company of New York in Civil No. 3883 and the Defendant Continental Casualty Company in Civil No. 3882 hereby appear and move the Court that they be granted Summary Judgment against the Plaintiff in each action dismissing the Plaintiff's Complaint on the grounds and for the reasons herein outlined.

The questions raised in the Complaint have been determined and the Plaintiff has been non-suited in both cases under the identical fact situation and therefore the issues here are res adjudicata. In support of this Motion the Defendants Continental Casualty Company and Fidelity and Casualty Company submit the attached brief.

Dated this 22 day of February, 1963.

JAMES L. LAMB
*Attorneys for Defendants*

## EXCERPT FROM BRIEF IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

Civil Nos. 3882 & 3883

Filed March 9, 1963

On December 10, 1960, action was commenced by the plaintiff under the Miller Act against the defendants in United States District Court for the District of North Dakota, Northeastern Division. Subsequently, summary judgment was entered based on stipulated facts and admissions. This summary judgment was appealed to the Court of Appeals for the Eighth Circuit and, as reported in 305 F.2d 794, the Court of Appeals, on June 30, 1962, remanded the cause to the District Court with directions to dismiss the complaint, which was done.

On April 20, 1961, *subsequent* to the commencement of the above action, notices required under the terms of the bond, were sent by plaintiff to the necessary defendants. Several days later actions were commenced in District Court, First Judicial District, for the State of North Dakota. These were not Miller Act actions. Later they were removed to Federal District Court on grounds of diversity of citizenship, and are the actions on which the motion for summary judgment in question are based.

* * *

## ORDER

Civil Nos. 3882 & 3883

Filed July 17, 1963

Both of the above-entitled actions were moved from the District Court, First Judicial District, State of North Dakota, pursuant to stipulation of the parties. Jurisdiction is vested in this Court under 28 U.S.C.A. § 1352. *Lasley v. United States*, 285 F.2d 98.

The Defendants, Progressive Contractors, Inc., and Wilshire Contractors, Inc., were prime contractors for the construction of housing units at the United States Air Force Base, Grand Forks, North Dakota. The Defendants, Continental Casualty Company and the Fidelity and Casualty

Company of New York, were sureties on the payment and performance bonds required by the Capehart Housing Act, as amended, 42 U.S.C.A. § 1594(a). The Plaintiff furnished materials to Wilshire and to various subcontractors of Progressive for which no payment has ever been made.

An action was previously commenced in this Court on the bonds after the Plaintiff had served notice on the Defendants pursuant to the procedural requirements of the Miller Act, 40 U.S.C.A. §§ 270a-270d. These notices concededly were not in compliance with the notice requirements contained in the bonds.

This Court held such notice sufficient for the Plaintiff to maintain the action, *United States v. Progressive Contractors, Inc.*, 196 F.Supp. 171; but the Court of Appeals reversed *sub nom, Continental Casualty Company v. United States*, 305 F.2d 794, holding that the procedural provisions of the Miller Act do not apply to Capehart contracts and their sureties, and that compliance with the notice provisions contained in the bonds is a condition precedent to an action on the bonds. Pursuant to the mandate of the Eighth Circuit, the complaint was then dismissed.

While the appeal was pending in *United States v. Progressive Contractors, Inc., supra*, the Plaintiff commenced the instant actions in State Court, alleging that written notice had been given the Defendants as required by the notice provisions contained in the bonds. The cases were removed to this Court and, after the decision of the Eighth Circuit in *Continental Casualty Company v. United States*, 305 F.2d 794, the Defendant sureties have moved for summary judgment on the grounds that "The question raised in the Complaint[s] have been determined and the Plaintiff has been non-suited in both cases under the identical fact situation and therefore the issues here are res adjudicata."[1]

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[1]Counsel doubtless meant res judicata. Black's Law Dictionary, Fourth Edition, defines res adjudicata as "A common but indefensible misspelling of res judicata."

The holding in *Continental Casualty Company v. United States, supra*, is that the notice requirements contained in the bonds are a condition precedent to an action on the bonds, and it, therefore, follows that if the Plaintiff can establish compliance, the instant actions may be decided on the merits. Questions of fact for determination are whether the notices were adequate in form and substance, timely, and given to the proper parties.

IT IS ORDERED that the motion of the Defendant Continental Casualty Company in Civil No. 3882 and the motion of the Defendants, Continental Casualty Company and Fidelity and Casualty Company of New York, in Civil No. 3883 for summary judgment be, and each such motion is hereby denied.

Dated at Fargo, North Dakota, this 17th day of July, A.D., 1963.

/s/ RONALD N. DAVIES
*United States District Judge*

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MEMORANDUM AND ORDER
Civil Nos. 3882 and 3883
Filed May 7, 1964

Following pre-trial conference had in the above cases on January 17, 1964, an order was entered requesting briefs on "the question of whether or not the state courts have jurisdiction of such actions and bearing upon the correctness of Judge Oliver's opinion and order providing for the dismissal of all such cases removed from state court." See: *Travis Equipment Company, Inc. v. D & L Construction Co. & Associates et al.*, D.C.Mo.,W.D.S.D. 1963, 224 F. Supp. 410. The matter discussed at said pre-trial conference was the jurisdiction of this Court, and that is the subject matter of this memorandum and order.

The within actions were commenced by the filing of a summons and complaint in the District Court of Grand Forks County, First Judicial District, State of North Dakota. As shown by the return of the Sheriff of Burleigh

County, North Dakota, substituted service was made on the defendants Continental Casualty Company and Fidelity and Casualty Company of New York on April 27, 1961, by delivering to and leaving with the North Dakota Commissioner of Insurance copies of the summons and complaint. Similar service was made upon the defendants Wilshire Contractors, Inc. and Progressive Contractors, Inc. on May 3, 1961. There is no question but that the service attempted and made complied in every respect with North Dakota law, and that such service was and is sufficient and complete.

On May 15, 1961, counsel for the Plaintiff and counsel for the Defendants Continental Casualty Company and Fidelity and Casualty Company of New York executed a stipulation ". . . that the above captioned matter shall be and hereby is removed . . . to United States District Court, for the District of North Dakota, Northeastern Division . . .". Pursuant to such stipulation, Honorable Ronald N. Davies, a judge of this Court, on May 18, 1961, signed and caused to be filed an order ". . .that the above captioned matter shall be and hereby is removed to the United States Federal Court for the District of North Dakota, Northeastern Division." Also on May 18, 1961, the separate answers of the Defendants Continental Casualty Company and Fidelity and Casualty Company of New York were filed in this Court. No answer or other responsive pleading has ever been filed by either of the Defendants Wilshire Contractors, Inc. or Progressive Contractors, Inc.; however, neither of said defendants was, at the time of execution of the stipulation for removal, or of the removal itself, in default.

On February 26, 1963, motions for summary judgment were filed by the surety defendants. Following oral argument on said motions and the submission of briefs, Judge Davies on July 17, 1963, filed his order denying each and both of the motions for summary judgment. In his July 17 order, Judge Davies states:

> "Both of the above-entitled actions were moved from the District Court, First Judicial District, State of North Dakota, pursuant to stipulation of the parties.

> Jurisdiction is vested in this Court under 28 U.S.C.A. Sec. 1352. *Lasley v. United States,* 285 F.2d 98."

It is apparent that no jurisdictional question was brought to the attention of Judge Davies, or considered by him, in his determination of the summary judgment motions. Had these actions been originally brought in this Court, its jurisdiction under 28 U.S.C.A., Section 1352, as referred to in Judge Davies' order, would be clear. However, since an attempt to remove these actions from state to federal court has been made, inquiry must be made as to whether there was compliance with the requirements of the applicable removal statutes. The basis of the motions for summary judgment, as stated in said motions, was that "The questions raised in the Complaint(s) have been determined and the Plaintiff has been non-suited in both cases under the identical fact situation and therefore the issues here are res adjudicata."

Notwithstanding the previous proceedings and order referred to, and the fact that no jurisdictional question (as regards removal procedure) has been raised by counsel, it is the imperative duty of this Court to notice a jurisdictional defect which is apparent upon the face of the record, and to remand the case of the state court when it is determined to have been improvidently removed. *Mutual Reserve Fund Life Ass'n. et al. v. Farmer,* 8 Cir., 1896, 77 F.929, 932.

> "Although no motion to remand has been filed, we have examined each of the actions to ascertain the extent of our jurisdiction. If it appears that the removals herein were 'improvident and without jurisdiction', we must *sua sponte* remand these causes to the state court." *Barnes et al. v. Parker et al.,* D.C.Mo., W.D.S.D., 1954, 126 F.Supp. 649, 650.

Section 1446, Title 28, U.S.C.A., sets forth the procedure for removing a case from state to federal court. There need be no lengthy citation of authority to support the proposition that the removal statute referred to must be strictly construed.

> "It is said that the trend of the decisions is to restrict and limit the removal jurisdiction of the federal courts. Certainly there is ample case support for the proposition that removal statutes will be strictly construed." 1 Barron & Holtzoff, Federal Practice and Procedure, p. 460.

Section 1446(a) of Title 28, U.S.C.A. provides that:

> "A defendant or defendants desiring to remove any civil action . . . from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plaint statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action."

The provisions of the quoted statute have been held to be jurisdictional, and not merely formal or modal and subject to waiver. *Yarbrough v. Blake*, D.C.Ark., W.D., 1962, 212 F.Supp 133, 136.

> "At every step in a case, a court must be wary of its jurisdiction. All the more should it be wary when an action is removed from state court. The rule is clear that if, at any time during a litigation, it is discovered that a case was improvidently removed, the court *must* remand the case to the state court regardless of whether a motion to remand is made by the parties. *The parties may not confer jurisdiction on the court by acquiescence in the removal.*" (Emphasis supplied to last sentence.) *Orleans Materials and Equipment Co., Inc. v. Isthmian Lines, Inc.*, D.C. La., E.D., 1963, 213 F.Supp. 325, 327.

> "The question of jurisdiction in the courts of the United States, those of first instance and these of appeal, is first and fundamental. The jurisdiction of the inferior courts of the United States rests wholly upon the acts of Congress. *It cannot be conferred by consent of the parties, or by estoppel,* and whenever it appears, as it did in this case, that jurisdiction was probably lacking, it was the duty of the court to inquire into it, regardless of the attitude of

the parties." (Emphasis supplied.) *St. Louis Smelting & Refining Co. v. Nix*, 8 Cir., 1921, 272 F.977, 978.

It has been pointed out that the instrument used in removing these cases from state court to this court was a stipulation executed by counsel for the plaintiff and counsel for the surety defendants, and subsequent court order. In view of the last cited cases, it is my opinion that the procedure employed did not conform to the prerequisites of Section 1446(a), and the attempted removal was and is a nullity. It follows that, in my opinion, the cases were improvidently removed, that this Court has no jurisdiction, and the cases must be remanded to the state court from whence they came.

In addition to the reasons set forth above in support of my decision to remand, there remains another jurisdictional defect which leads to the same conclusion and result.

The cases uniformly hold that in an action brought against two or more defendants on a joint cause of action, all defendants who have been served with process and who are entitled to remove must join in the petition for removal. *Wright v. Missouri Pac. R. Co.*, 8 Cir., 1938, 98 F.2d 34. Also see: *Lancer Industries, Inc. v. American Insurance Co. et al.*, D.C.La., W.D., 1961, 197 F.Supp. 894, 900. Of course, mere nominal or formal parties need not join in the petition for removal. *Shattuck v. North British & Mercantile Ins. Co.*, 8 Cir., 1893, 58 F. 609. However, where "... all persons who have an interest in the controversy of such a nature that a final decree cannot be made without affecting that interest, or without leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience,..." they are "indispensable parties" and, as such, must join in a petition for removal. *Alden v. Central Power Electric Cooperative, Inc.*, D.C.N.D., 1956, 137 F.Supp. 924, 926.

It clearly appears that the allegations contained in the complaints herein set forth joint causes of action as concerns the named defendants. This is, of course, a necessary qualification to the requirement that all defendants who

have been served and are otherwise entitled to remove must join in the removal petition.

> "Since the cause of action alleged in the complaint asserts a joint liability, the petition for removal must be joined in by all of the defendants." *Barnes v. Parker, supra,* p. 650.

In an action against a principal and his surety on a bond, such as is the case in this instance, where there is alleged a joint liability on the part of the defendants, there is in fact a joint cause of action, even though there may be separate and different defenses. *Texas Wool & Mohair Marketing Ass'n v. Standard Acc. Ins. Co.*, 5 Cir., 1949, 175 F.2d 835, 837. And it makes no difference that the plaintiff could have, if it so desired, sued either of the defendants (principal or surety) in separate actions.

> "It follows, therefore, that the suit brought against the defendant companies for the alleged breach of the condition of the bond which they had jointly executed for the protection of the policy holders of the life association was not removable to the circuit court of the United States for the Eastern district of Arkansas, under the separable controversy clause of the removal act, because the complaint which was filed in said suit stated but a single cause of action. It is true that the plaintiff below was not compelled to sue both of the defendant companies. She might have maintained an action against either one of the defendants, and that she was not bound to sue both, does not show that there was a separable controversy, within the purview of the removal act. The existence or nonexistence of a separable controversy must in every case be tested by the inquiry whether the declaration or complaint discloses more than one cause of action." *Mutual Reserve Fund Life Ass'n et al. v. Farmer, supra,* p. 932.

On its face, the complaint filed in each of the actions herein clearly discloses a single cause of action, joint in nature, against the defendants therein named. Since the de-

fendants who were principals on the bonds (Wilshire and Progressive) and who, together with their sureties were made defendants on a single, joint cause of action, did not join in the attempt which was made to remove the cases to this Court, the actions must be remanded.

This is one of those instances where the removal jurisdiction of the federal court is more restricted and narrower than its original jurisdiction. There is no question but that this Court had original jurisdiction of the within actions, in that the plaintiff could have originally brought his lawsuits in federal court. However, "If such a situation as the present one creates any inequities among litigants, it is up to Congress to rectify the same." *Universal Surety Company v. Manhattan Fire & Marine Insurance Co. et al.*, D.C.S.D., 1958, 157 F.Supp. 606, 611.

For the reasons hereinbefore stated, and on this Court's own motion, it is hereby

ORDERED that the above entitled actions be, and the same are, in all things, remanded to the District Court of Grand Forks County, First Judicial District, State of North Dakota.

Bismarck, North Dakota, this 6th day of May, 1964.

/s/ GEORGE S. REGISTER
*Chief Judge*

## NOTICE OF AND MOTION TO DISMISS

TO: THE ROBERTSON LUMBER COMPANY, A CORPORATION, PLAINTIFF, and SHAFT, BENSON, SHAFT & McCONN, ITS ATTORNEYS:

YOU WILL PLEASE TAKE NOTICE, That on the 22nd day of June, 1965 at 10:00 o'clock A. M. or as soon thereafter as counsel can be heard, the Defendant will move the Court in the Court Chambers in the Court House, Grand Forks, North Dakota, to dismiss this action on the grounds and for the reason that the Court does not have any jurisdiction in this case pursuant to Title 40, U.S.C.A., § 270a and § 270b and, in particular, § 270b(b) which states:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere . . ."

That this is the established law in this area is conclusively determined by the 8th Circuit in *Koppers Company, Inc. v. Continental Casualty Company, Inc.* (8th Cir. 1964) 337 F.2d 499.

Dated this 15th day of June, 1965.

JAMES L. LAMB
For: DEGNAN, McELROY & LAMB
201 Red River National Bank Building
Grand Forks, North Dakota
*Attorneys for Defendant, Continental Casualty Company*

## STIPULATION
Civil Nos. 3882 and 3883

Come now the attorneys for the Plaintiff and the attorneys for the Defendants, Continental Casualty Company, a corporation and Fidelity and Casualty Company of New York, in the above entitled action and stipulate to the following facts:

1. That the Wilshire and Progressive actions may be tried together as one case and that the questions involved in both actions are identical except for the amounts involved and that all evidence offered in one action may be considered as being offered in the other action as well as any objections to such evidence.

2. That, if judgment is found for the Plaintiff in the Progressive action it shall be in the sum of $13,780.08 plus interest and costs and disbursements.

3. That, if judgment is found for the Plaintiff in the Wilshire action it shall be for the sum of $529.18 plus interest and costs and disbursements.

4. That the Plaintiff did furnish the materials as set forth in the Complaints in both actions and such materials were of the value as alleged except in the Progressive action, the value of the materials is reduced from $15,398.82 to $13,780.08.

5. That on April 20, 1961, the plaintiff mailed the notices as required under Sec. 4(a) of the bond and that such notices contained the required information and were mailed to the required parties under the bond. That attached to this Stipulation is a copy of the form of bond on said projects, which bond contains all of the terminology concerning notice requirements.

6. That on the 11th day of December, 1960, Plaintiff commenced actions against these defendants for the amounts claimed in these actions in Federal Court for Northeastern Division, District of North Dakota, which complaints were dismissed by the 8th Circuit Court of Appeals in 1962 (Robertson Lumber Co. v. Continental Casualty Company,

305 F.2d 794). The Defendants named and sued and served under the actions in Federal Court were those required to be served under the terms of the bond.

7. That the notice as required under Sec. 4(a) of the bond was sent to the principals alone on July 22, 1960, which period was within the 90 days of the furnishing of the last material by the plaintiff but which notice was mailed only to the principals on the bonds and to no other parties.

8. That the principal abandoned the project on May 20, 1960.

9. That the deposition of Norbert K. Drake, former Assistant Secretary of Continental Casualty Company, may be used as evidence in this trial, subject to the same rulings on the objections to testimony included in said deposition in the action wherein Ireland Lumber Yards, Inc., a corporation, is Plaintiff vs. the same defendants and which action was tried immediately preceding this action.

10. That the principals, Progressive Contractors, Inc. and Wilshire Contractors, Inc. are in default.

11. That these suits were commenced in the District Court, First Judicial District within one year of the furnishing of the material under the contract by the plaintiff.

Dated this 30th day of January, 1967.

JOHN G. SHAFT
*Attorneys for Plaintiff*

JAMES L. LAMB
*Attorneys for Defendants*

## Defendant's Exhibit No. 2

### Bond by Continental Casualty Company.

FHA Form No. 2452CP
Revised May 1957 Project No. 094-81001 AIR NO. 1

### Federal Housing Administration

### Payment Bond—Dual Obligee

### (Armed Services Housing Projects)

Know All Men By These Presents, That We, Progressive Contractors, Inc., of Los Angeles, California (hereinafter called the Principal) and the corporations hereinafter designated as Surety A to Surety B, inclusive (hereinafter called Sureties), are held and firmly bound unto Grand Forks AFB Housing, Inc. (hereinafter called "Mortgagor-Builder"), and unto The Provident Institution for Savings in the Town of Boston, its successors and assigns, of Boston, Massachusetts (hereinafter called the "Lender"), as their respective interests may appear, as Obligees, in the sum of Two Million Forty-Nine Thousand Six Hundred & 00/100ths Dollars ($2,049,600.00), lawful mongy of the United States of America, for the payment of which Principal and Sureties bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents: Provided, that we the sureties bind ourselves in such sum "jointly and severally" as well as "severally" only for the purpose of allowing a joint action or actions against any or all of us, and for all other purposes each surety binds itself, jointly and severally with the principal, for the payment of such sum only as is set forth opposite its name in the following schedule:

| Surety | Name and State of Incorporation | Limit of Liability |
|---|---|---|
| A | Continental Casualty Company | $1,434,720.00 |
| B | Fidelity and Casualty Company of New York—New York | $ 614,880.00 |

Whereas, Principal has entered into a Housing Contract, dated August 25th, 1958, with the Mortgagor-Builder and

the Department of the Air Force for the construction of an Armed Services Housing Project designated as FHA – Project No. 094-81001 Air No. 1, a copy of which Housing Contract is by reference made a part hereof and is hereinafter referred to as the Contract; and

Whereas, Lender under a certain Building Loan Agreement, dated August 25th, 1958, has agreed to lend to the Mortgagor-Builder a sum of money to be secured by a mortgage on said project and to be used by the Mortgagor-Builder in making payments to the Principal under said Contract, and the Obligees desire assurance of the prompt payment by Principal for all labor and material furnished in the prosecution of the work provided for in the Contract.

Now, Therefore, the condition of this obligation is such that if the Principal shall promptly make payment to all claimants as hereinafter defined for all labor and material furnished in the prosecution of the work provided for in the Contract, then this obligation shall be null and void; otherwise, it shall remain in full force and effect. A claimant, as hereinafter defined, shall have a direct right of action hereunder against the Sureties, subject to the following conditions:

1. A claimant is defined as one having a direct contract with the Principal or with a subcontractor of the Principal who has furnished labor, material, or both, in the prosecution of the work provided for in the Contract and who has not been paid in full therefor. Labor and material are construed to include, but are not limited to, that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental of equipment directly applicable to the Contract.

2. The above named Principal and Sureties hereby jointly and severally agree with the Obligees that every claimant as herein defined, who has not been paid in full before the expiration of a period of ninety (90) days after the date on which the last of such claimant's work or labor was done or performed or materials were furnished by such claimant or before the expiration of the period provided by the law of the place where the project is located for the giving of first notice of a lien of the category

claimed by claimant, whichever period be longer, may sue on this bond for the use of such claimant in the name of either of the Obligees or their assignee hereunder, or in the name of the claimant, prosecute the suit to final judgment for such sum or sums as may be justly due claimant, and have execution thereon; provided, however, that the Obligees or their assignee hereunder shall not be liable for the payment of any costs or expenses of any such suit.

3. Sureties agree that any right of action that either of the Obligees herein might have under this bond may be assigned to the Federal Housing Commissioner, and that such assignment will in no manner invalidate or qualify this instrument.

4. No suit or action shall be commenced hereunder by any claimant,

(a) Unless claimant shall have given written notice to any two of the following: The Principal, any one of the Obligees, or the Sureties above named, before the expiration of the period referred to in condition 2 above, stating with substantial accuracy the amount claimed and the name of the party to whom the materials were furnished, or for whom the work or labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in any envelope addressed to the Principal, any one of the Obligees, or Sureties, at any place where an office is regularly maintained by the addressee for the transaction of business, or served in any manner in which legal process may be served in the place in which the aforesaid project is located, save that such service need not be made by a public officer. For the purpose of this condition 4 (a), either the giving of notice, or the filing of lien, in accordance with the pertinent lien law of the place where the project is located is a sufficient notice hereunder.

(b) After the expiration of one (1) year following the date on which Principal ceases work on the Contract. Work under the Contract includes work on approved items of delayed completion.

(c) Other than in a State court of competent jurisdiction in and for the county or other political subdivi-

sion of the State in which the project, or any part thereof, is situated, or in the United States District Court for the district in which the project, or any part thereof, is situated and not elsewhere.

5. The amount of this bond shall be reduced by and to the extent of any payment or payments made in good faith hereunder, inclusive of the payment by Sureties of liens which may be filed of record on account of any labor or material furnished under the Contract, whether or not claim for the amount of such lien be presented under and against this bond.

Signed and Sealed this 25th day of August, 1958.

PROGRESSIVE CONTRACTORS, INC., (Seal)
(Principal)

By .....

Witness as to Principal:

.....

CONTINENTAL CASUALTY COMPANY,
(Surety)

By EUGENE F. HESSION,
EUGENE F. HESSION,
Attorney-in-Fact.

FIIA 2452 CP

FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

By: .....

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT

The above entitled matter having come on regularly to be heard before the undersigned, the Hon. Hamilton Englert, District Judge, in the District Court, First Judicial District, at its Chambers in the city of Bismarck, State of North Dakota, on the 30th day of January, 1967, upon Plaintiff's Complaint, John G. Shaft of Shaft, Benson, Shaft & McConn appearing as attorney for the Plaintiff, and James L. Lamb, of Degnan, McElroy, Lamb & Camrud, appearing as attorney for the Defendants Continental Casualty Company, a corporation, and Fidelity and Casualty Company of New York, a corporation, and there being no appearance on behalf of the Defendant Progressive Contractors, Inc., a corporation and the Defendant Progressive Contractors, Inc., a corporation being in default, and it appearing to the Court that the Summons and Complaint in said action were duly served upon said defendants and each of them and the Defendants Continental Casualty Company, a corporation, and Fidelity and Casualty Company of New York, a corporation having interposed their answers and appeared herein, and the Court having read the pleadings, and considered a certain stipulation presented to the Court between the Plaintiff and the Defendants, Continental Casualty Company and Fidelity and Casualty Company of New York and having received in evidence a certain deposition of Norbert A. Drake on behalf of the Defendants, Continental Casualty Company and Fidelity and Casualty Company of New York and having heard the arguments of counsel and being fully advised in the premises, now makes the following:

### FINDINGS OF FACT

1. That the Plaintiff is a corporation duly organized and existing under the laws of the State of North Dakota.

2. That the Defendants and all of them, are foreign corporations.

3. That on or about the 1st of August, 1958, the Defendant Progressive Contractors, Inc., a corporation, entered into a contract or contracts with the United States of America and various Grand Forks Air Force Base Housing Corporations for the furnishing of materials and labor and for the construction of 744 housing units at the Grand Forks Air Force Base, which contract is designated as AF 32(605)-22, Armed Services Housing Project.

4. That on or about the 8th day of August, 1958, in compliance with the requirements of the Capehart Housing Act, the Defendant, Progressive Contractors, Inc., a corporation, as Principal, and the Defendants Continental Casualty Company and Fidelity and Casualty Company of New York, as Sureties A and B, executed and delivered certain payment bonds conditioned among other things that if the principal should promptly make a payment to all claimants for all labor and material furnished in the prosecution of the work provided for in the contracts, the said bonds should be null and void, that otherwise any claimants should have a direct right of action under said bonds for any and all labor and material furnished in the prosecution of the work provided for in the contract and who has not been paid in full therefor; that said bonds define a claimant as one having a direct contract with the principal or with a subcontractor of the principal who has furnished labor, material or both, in the prosecution of the work provided for in the contracts; that said bonds are described as follows:

a. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81001-Air No. 1, Bond No. 15-1748, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing, Inc. as mortgagor-builder, The Provident Institution for Savings in the Town of Boston as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $2,049,600.00.

b. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81002-Air No. 2, Bond No. 15-1745, Progressive Contractors, Inc. as Principal,

Grand Forks AFB Housing No. Two, Inc. as Mortgagor-builder, Manufacturers Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $1,835,000.00.

c. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81009-Air No. 9, Bond No. 15-1746, Progessive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Three, Inc. as mortgagor-builder, Manufacturer's Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $2,072,700.00.

d. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81010-Air No. 10, Bond No. 15 1746, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Four, Inc., as mortgagor-builder, Manufacturer's Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $1,233,200.00.

e. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81011-Air No. 11, Bond No. 15-1747, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Five, Inc., as mortgagor-builder, Manufacturer's Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York as Sureties, dated August 25, 1958, in the amount of $2,030,200.00.

f. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81012-Air No. 12, Bond No. 15-1750, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Six, Inc., as mortgagor-builder, The Provident Institution for Savings in the Town of Boston, as lender, and Continental Casualty Company and Fidelity and Casualty Com-

pany of New York as Sureties, dated August 25, 1958, in the amount of $1,963,000.00.

g. F.H.A. form No. 2452CP, Revised May, 1957, Project No. 094-81016-Air No. 16, Bond No. 15-1749, Progressive Contractors, Inc. as Principal, Grand Forks AFB Housing No. Seven, Inc., as mortgagor-builder, Manufacturer's Trust Company of New York as lender, and Continental Casualty Company and Fidelity and Casualty Company of New York, as Sureties, dated August 25, 1958, in the amount of $887,400.00.

5. That thereafter the plaintiff entered into continuing contracts with certain corporations called Cemaco, Inc., Dakota Lumber Company, Howard Chace Tile Co., Ikart Construction Co., Gatho, Inc., Archer Painting Co., NaMar Builders, Inc. and Lanat, Inc., wherein the plaintiff agreed and did furnish to said corporations certain materials required by said corporations; that the plaintiff has fully performed all of the terms of these contracts but that said corporations and the defendant, Progressive Contractors, Inc., have failed to pay the full amount due and payable under said contracts; that all of said materials were accepted by said corporations and the defendant Progressive Contractors, Inc., and that the total balance remaining due under said contracts is Fifteen Thousand Three Hundred Ninety-eight and 83/100 Dollars ($15,398.83) with interest thereon at the legal rate, which sum the defendant, Progressive Contractors, Inc. and said corporations have failed, neglected and refused to pay.

6. That said corporations, Cemaco, Inc., Dakota Lumber Company, Howard Chace Tile Co., Ikart Construction Co., Gatho, Inc., Archer Painting Co., Na Mar Builders, Inc. and Lanat, Inc., are subcontractors of the defendant, Progressive Contractors, Inc.

7. That prior to the commencement of this action, the plaintiff gave written notice to the defendants that plaintiff had supplied materials to the partial construction of the 744 housing units previously described, all as provided under the terms of the previously described bonds.

8. That the plaintiff furnished materials as set forth above of the value of Thirteen Thousand Seven Hundred Eighty and 08/100 Dollars ($13,780.08).

9. That on April 20, 1961, the plaintiff mailed the notices as required under Sec. 4(a) of the hereinbefore described bonds and that such notices contained the required information and were mailed to the required parties under the bonds.

10. That on the 11th day of December, 1960, the plaintiff commenced an action against the defendants for the amounts claimed in these actions in Federal Court for the Northeastern Division, District of North Dakota, which complaints were dismissed by the Eighth Circuit Court of Appeals in the year 1962.

11. That the notice as required under Sec. 4(a) of the bond was sent to the principals alone on July 22, 1960, which period was within the 90 days of the furnishing of the last material by the plaintiff but which notice was mailed only to the principals on the bonds and to no other parties.

12. That the principals abandoned the project on May 20, 1960.

13. That this suit was commenced in District Court, First Judicial District, within one year of the furnishing of the material under the contract by the plaintiff.

From the foregoing Findings of Fact, the Court makes the following:

## CONCLUSIONS OF LAW

1. That the Court has jurisdiction over the parties in the subject matter of the suit.

2. That the defendants, Continental Casualty Company, a corporation and Fidelity and Casualty Company of New York, a corporation, have failed to sustain their burden of proof to show that said defendants were prejudiced by any

failure to give notice under the terms of the bond by the plaintiff.

3. That any previous action by the plaintiff against any of the defendants was not res judicata as to this action.

4. That the plaintiff, The Robertson Lumber Company, a corporation, is entitled to have and recover judgment against the defendants, Progressive Contractors, Inc., a corporation, Continental Casualty Company, a corporation, and Fidelity and Casualty Company of New York, a corporation, in the amount of Thirteen Thousand Seven Hundred Eighty and 08/100 Dollars ($13,780.08) together with interest thereon at the legal rate and together with its costs and disbursements herein to be taxed by the Clerk of the District Court.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 4th day of March, 1967.

BY THE COURT:

/s/ Hamilton E. Englert
District Judge

JUDGMENT

The above entitled matter having come on regularly before the undersigned, one of the judges of the above named court as its chambers in said District on the *30th* day of January, 1967, upon plaintiff's Complaint, John G. Shaft of Shaft, Benson, Shaft & McConn appearing for the plaintiff and James L. Lamb of Degnan, McElroy, Lamb & Camrud appearing as attorney for the defendants Continental Casualty Company, a corporation and Fidelity and Casualty Company of New York, a corporation and there being no appearance on behalf of the defendant Progressive Contractors, Inc., a corporation and said Progressive Contractors,

Inc., being in default, and it appearing to the Court that the Summons and Complaint in said action were duly served upon said defendants and each of them and the defendants Continental Casualty Company and Fidelity and Casualty Company of New York having interposed an Answer and appeared therein, and the Court having read the pleadings, considered a stipulation of facts entered into between the plaintiff and the defendants Continental Casualty Company and Fidelity and Casualty Company of New York and having received in evidence a certain deposition of Norbert A. Drake, and having heard the arguments of counsel and having presented and filed herein its Findings of Fact, Conclusions of Law and Order for Judgment;

NOW, THEREFORE, upon motion of Messrs. Shaft, Benson, Shaft & McConn, attorneys for the plaintiff and in accordance with said Order for Judgment,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff, the Robertson Lumber Company, a corporation, shall have judgment against the defendants, Progressive Contractors, Inc., a corporation, Continental Casualty Company, a corporation and Fidelity and Casualty Company of New York, a corporation in the amount of Thirteen Thousand Seven Hundred Eighty and 08/100 Dollars ($13,780.08) with interest thereon at 4% per annum together with its costs and disbursements herein to be taxed by the Clerk of the District Court in the amount of $17.50.

WITNESS, the Honorable Hamilton Englert, District Judge, in and for the District Court, First Judicial District, at its Chambers in Grand Forks, State of North Dakota, this 10th day of March, 1967.

/s/ Ruby Heen
Clerk of the District Court

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## NOTICE OF APPEAL

TO: THE RESPONDENT, THE ROBERTSON LUMBER COMPANY, ABOVE NAMED AND ITS ATTORNEY JOHN G. SHAFT OF SHAFT, BENSON, SHAFT & McCONN:

NOTICE IS HEREBY GIVEN that the Appellants, Continental Casualty Company and Fidelity and Casualty Company of New York, foreign corporations, do appeal to the Supreme Court of the State of North Dakota from the Judgment of the Court dated March 10, 1967, in favor of the Plaintiff in the sum of Thirteen Thousand Seven Hundred Eighty and 08/100 Dollars ($13,780.08), plus interest, costs and disbursements.

The Appellants above named demand a trial de novo of the entire action in the Supreme Court.

Dated this 25th day of April, 1967.

JAMES L. LAMB
*Attorneys for Appellants*

File No. 8462

STATE OF NORTH DAKOTA,

ss.

In the Supreme Court,

Appeal from the District Court of Grand Forks County.

The Robertson Lumber Company,
a corporation,

Plaintiff and Respondent

v.

Progressive Contractors, Inc.,
a corporation,

Defendant

and

Continental Casualty Company, a
corporation and Fidelity and Casualty
Company of New York, a corporation,

Defendants and Appellants

This action coming on to be heard at the January A. D. 1968 term of this Court at the Supreme Court rooms in the City of Bismarck, State of North Dakota:

Present: Honorable Obert C. Teigen, Chief Justice; Honorable Alvin C. Strutz, Honorable Ralph J. Erickstad, Honorable Harvey B. Knudson, Honorable Wm. L. Paulson, Associate Justices; and the appeal herein having been argued by Mr. James L. Lamb for the Appellant and argued by Mr. John G. Shaft for Respondent and the court having been advised thereon it is now considered, ordered and adjudged that the judgment of the said District Court within and for said Grand Forks County appealed from herein, be and the same IS hereby AFFIRMED.

AND IT IS FURTHER ORDERED, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

AND IT IS FURTHER CONSIDERED AND ADJUDGED, That Respondent have and recover of the Appellants costs and dis-

bursements on this appeal expended, to be taxed and allowed in the District Court. Dated July 3, 1968

By the Court,

Attest: J. H. NEWTON
*Clerk*

OBERT C. TEIGEN
*Chief Justice*

STATE OF NORTH DAKOTA, )
(ss
IN THE SUPREME COURT. )

J. H. Newton, Clerk of the Supreme Court, within and for the State of North Dakota, do hereby certify that the above and foregoing is a full, true, correct and complete copy of the order of the Supreme Court of the State of North Dakota, in the above entitled action, and the same is transmitted to the District Court in and for the County of Grand Forks, State of North Dakota, as the Remittitur herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court this 20th day of July A.D. 1968.

/s/ [Illegible]
Clerk

Fees, Clerk of Supreme Court, taxed and allowed at $15.00

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF GRAND FORKS FIRST JUDICIAL DISTRICT

The Robertson Lumber Company, a corporation,

Plaintiff-Respondent,

v.

Progressive Contractors, Inc., a corporation,

Defendant,

and

Continental Casualty Company, a corporation and Fidelity and Casualty Company of New York, a corporation,

Defendants-Appellants,

## ORDER FOR JUDGMENT ON REMITTITUR

The Defendants, Continental Casualty Company, a corporation and Fidelity and Casualty Company of New York, a corporation having duly appealed to the Supreme Court of the State of North Dakota from a Judgment of the District Court in and for the First Judicial District, Grand Forks County, North Dakota, in favor of the Plaintiff and against the Defendants, and the Supreme Court of the State of North Dakota having rendered its decision on July 3, 1968 and having filed the same affirming the Judgment of the District Court and the Remittitur having been transmitted to the District Court of Grand Forks County on July 21, 1968,

NOW THEREFORE, in accordance with said decision and Remittitur,

IT IS HEREBY ORDERED that the said Judgment of the District Court be affirmed and that the Defendants' costs on appeal be taxed by the Clerk of the Court.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Valley City, North Dakota this 17th day of August, 1968.

/s/ HAMILTON E. ENGLERT
*District Judge*

## APPENDIX D

United States Court of Appeals
For the Eighth Circuit.

No. 16,912.

Continental Casualty Company, a Corporation, Appellant,

vs.

The United States of America for the Use and Benefit of the Robertson Lumber Company, a Corporation, Appellee.

Appeal from the United States District Court for the District of North Dakota.

(June 30, 1962.)

Before Van Oosterhout and Blackmun, Circuit Judges, and Henley, District Judge.

Henley, District Judge.

This litigation arose out of the construction of certain housing for military personnel stationed at the Grand Forks Air Force Base, Grand Forks, North Dakota, under the housing program authorized by the Capehart Housing Act, as amended.[1] Appellee, use plaintiff below, furnished materials to the prime contractor engaged in the construction of the housing and not being paid therefor commenced

[1] Act of August 11, 1955, Public Law 84-345, 69 Stat. 646 ff., as amended by Act of August 7, 1956, Public Law 84-1020, 70 Stat. 1110, 12 U. S. C. A., §§ 1748 ff. and 42 U. S. C. A., §§ 1592 ff.

this action against the prime contractor and one of the sureties on the contractor's statutory payment bond. The contractor did not defend the action. The issues between appellee and the surety were narrowed to a single question of law, and the District Court rendered summary judgment for appellee. **United States for the Use and Benefit of the Robertson Lumber Company v. Progressive Contractors, Inc. et al.**, D. C. N. Dak., 196 F. Supp. 171. This appeal followed.

The 1956 amendment to the Capehart Act provided that all contracts for Capehart housing "shall provide for the furnishing by the contractor of a performance bond and a payment bond with a surety or sureties satisfactory to the Secretary of Defense or his designee, and the furnishing of such bonds shall be deemed a sufficient compliance with the provisions of section 270a of Title 40, and no additional bonds shall be required under such section."[2]

The bond in suit was executed on a form specifically prescribed by the contract for the construction of the housing, which form had been adopted by the Department of Defense and by the Federal Housing Commissioner. The bond contained certain provisions for notice to be given by laborers or materialmen as a condition precedent to action on the bond. Admittedly, appellee failed to give the notice required by the bond, and appellant pleaded this failure as a complete defense.

In meeting this defense appellee contended that the relationship between the Capehart Act and the Miller Act was such that a supplier of labor or materials to a Cape-

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[2] 42 U. S. C. A., § 1594. Section 270a of Title 40, U. S. C. A., referred to in the Capehart Act, as amended, is section 1 of the Miller Act which requires the giving of performance and payment bonds by contractors engaged in the construction, alteration, or repair of any "public building or public work of the United States," where the amount of the contract exceeds $2,000.

hart housing contractor is entitled to all of the protection of the Miller Act, that the procedural provisions of the Miller Act (40 U. S. C. A., § 270b and c) extend to bonds executed under the Capehart Act, and that notice requirements inserted in a Capehart bond which are more stringent than the notice requirements of the Miller Act are invalid and are to be ignored. The notice provisions of the bond in suit are in fact more stringent than the notice requirements of the Miller Act, and appellee had met all of the requirements of that Act. Based on those premises appellee urged that the defense set up by appellant was without merit.

In attacking the judgment of the District Court appellant takes the position that although the Capehart Act refers to section 1 of the Miller Act, nevertheless a Capehart Act bond is not a Miller Act bond; that the Secretary of Defense or his designee has the power to prescribe the form and contents of a Capehart bond; that the form here used was prescribed by and satisfactory to the Department of Defense; that the notice provisions contained in the bond were valid, and that compliance therewith was a condition precedent to action on the bond.

Alternatively, appellant contends that even if the Secretary and the Federal Housing Commissioner had no right to insert in the bond notice requirements in excess of those contained in the Miller Act, nevertheless such requirements were in fact inserted, and that the liability of the surety should be measured by the terms of the instrument which it actually signed rather than by the terms of the Miller Act.

As is well known, the Miller Act, adopted in 1935, has for its purpose the protection of those who supply labor or materials for use in Government construction. **Fanderlik-Locke Co. v. United States for Use of M. G. Morgan,**

10 Cir., 285 F. 2d 939; **United States for Use of Hopper Brothers Quarries v. Peerless Casualty Co.**, 8 Cir., 255 F. 2d 137; **St. Paul-Mercury Indemnity Co. v. United States for Use of H. C. Jones**, 10 Cir., 238 F. 2d 917. The Act, which is to be construed liberally, is designed to give such suppliers the same protection that State lien laws give ordinarily to persons furnishing labor and materials for use in private construction; and since the property of the United States is not subject generally to State lien laws, the bond protection of the Miller Act is in lieu of the liens provided by State law. **United States for Use of Munroe-Langstroth, Inc. v. Praught**, 1 Cir., 270 F. 2d 235; **United States for Use of Gibson v. Harman**, 4 Cir., 192 F. 2d 999; **United States for Use of Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corporation**, D. C. Md., 186 F. Supp. 639; **United States for Use of James F. O'Neil Co. v. Malan Construction Corp.**, E. D. Tenn., 168 F. Supp. 255.

As far as notice is concerned a Miller Act supplier who deals directly with a prime contractor is not required to give any notice as a condition precedent to a suit on the bond, although presumably he will make demand for payment before commencing his suit. Where the supplier deals with a subcontractor, he is required to give notice to the prime if he expects to recover against the prime and the latter's surety, but in no event is a Miller Act supplier required to give notice to the surety before commencing suit or, in any event, to give notice to more than one person or entity. 40 U. S. C. A., § 270b (a).[3]

The purpose of the Capehart Act was to provide urgently needed housing for military personnel on Govern-

[3] The prescribed form of Capehart bond which appellant executed required "dual notice" as a condition precedent to suit on the bond. That is to say, a supplier of labor or materials was required to give notice to at least two of the parties to the bond, one of which parties might be the surety.

ment property, and while Capehart housing is undoubtedly "Government housing," Capehart construction differs from conventional Government construction in certain significant respects.

Ordinarily, federal public works are paid for both initially and finally with federal funds. Capehart housing, on the other hand, initially is built and financed by private capital, although loans made by financial institutions to finance the construction are fully insured by the Federal Housing Administration. Both the Department of Defense and the Federal Housing Administration are concerned with the administration of the Capehart program, and the Federal Housing Commissioner has been authorized to promulgate regulations concerning the program, 12 U. S. C. A., § 1748f, which authority has been exercised, see 24 C. F. R., Part 292a.

The Capehart Act now requires both payment and performance bonds, and standard forms of those bonds have been worked out by the Department of Defense and the Federal Housing Administration, and all Capehart housing contracts call for the giving of those particular bonds, as was done in this case.

With some allowance for possible oversimplification, a typical Capehart project may be described substantially as follows:

A building contractor desiring to build Capehart housing and who has been the successful bidder for such housing, and who has made satisfactory arrangements to secure private financing, forms a corporation to take a long term lease on the Government property on which the housing is to be constructed and to execute a mortgage on the leasehold estate to the financial institution which is to lend the money required for construction purposes. This corporation, which is at all times under complete Govern-

ment control, does not do the actual building of the housing units. That is done by the contractor under contract with the Government and with the corporation. The functions of the corporation are limited and to some extent nominal. It takes the lease and executes the mortgage and is a party to the construction contract. Further, it is one of the obligees named in the contractor's performance and payment bonds in the statute, regulations and contract documents the contractor is called the "eligible bidder;" the corporation is called the "mortgagor-builder," and the lending agency is called the "mortgagee."

As the project is completed, the housing units are turned over to and occupied by military personnel. Quarters allowances previously paid to such personnel are retained by the Government and used to pay off the mortgage. When the mortgage is finally retired, the lease to the "mortgagor-builder" is terminated, and that corporation is dissolved, leaving title to the housing in the Government.

The contractor derives his profit from doing the actual building of the housing. From the Government's standpoint, advantages are seen in that federal funds are not expended for initial construction, and while the housing will be paid for eventually with federal money, that money would have been expended in any event as quarters allowances for the affected service personnel. In addition, the program may be supposed to provide a stimulus for private industry and capital.

Having made the foregoing comments with regard to the Miller Act and the Capehart Act and the program contemplated by the latter Act, we return to the question for decision which is whether the notice provisions contained in the bond in suit were valid.

In holding those provisions invalid the District Court cited **Lasley v. United States for Use of C. C. Westerman,**

5 Cir., 285 F. 2d 98; **United States for Use of Acme Furnace Fitting Co. v. Ft. George G. Meade Defense Housing Corporation**, supra; and **Autrey v. Williams & Dunlap**, W. D. La., 185 F. Supp. 802. Although none of those cases involved the validity of the notice provisions appearing in Capehart bonds,[4] it may be conceded that when those decisions are broadly read, they tend to support the District Court's decision in this case since they appear to proceed upon the theory that Capehart contractors and their sureties are subject to the procedural provisions of the Miller Act, including the notice provisions. This theory seems to be based on the premise that prior to the 1956 amendment to the Capehart Act, Capehart contractors were subject to all of the provisions of the Miller Act. From that premise it was reasoned that since the 1956 amendment modified only the prior existing substantive obligations of the contractors to furnish bonds meeting the requirements of 40 U. S. C. A., § 270a, the procedural provisions of the other sections of the Miller Act still apply to Capehart housing. See **Westerman**, supra, 285 F. 2d at 100.

We find ourselves unable to agree with the **Westerman** case and the other decisions cited by the District Court

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[4] Specifically, the question before the courts in all of those cases was whether a Capehart supplier could sue in federal court by virtue of the grant of federal jurisdiction conferred by the Miller Act. 40 U. S. C. A., § 270b (b). That question was answered in the affirmative in all three cases. However, as was recognized in *Westerman*, another basis for federal jurisdiction of a suit on a Capehart bond is to be found in 28 U. S. C. A., § 1352 which provides that the State and the federal courts shall have concurrent jurisdiction with respect to all actions brought on any bonds required by "any law of the United States." A Capehart bond is clearly a bond required by a "law of the United States," hence, federal jurisdiction of a suit on such a bond is established without regard to any relationship between the Miller Act and the Capehart Act. The *Westerman* case was tried on its merits by the writer of this opinion while sitting by special assignment in the Western District of Texas. However, the jurisdictional question had been passed upon by one of the regular judges of the District.

and relied upon by appellee. Without necessarily [redacted]ing with the **Westerman** premise that prior to 1956 Capehart contractors were required to furnish Miller Act bonds,[5] we are of the opinion that when Congress amended the Capehart Act in 1956 it recognized that Capehart housing is not conventional Government construction, that the private construction and financing of Capehart housing and the joint administration of the Capehart program by the Department of Defense and the Federal Housing Administration presented problems not encountered in ordinary Government construction, and that it intended, as far as bond protection for laborers and materialmen is concerned, to treat Capehart housing as *sui generis*. While we think that Congress intended that Capehart suppliers should have substantive bond protection essentially similar to that afforded Miller Act suppliers, we think also that Congress intended that the procedural provisions of Capehart bonds should be worked out and prescribed by the two agencies involved in the light of the unique nature of Capehart construction and of the peculiar problems which might be encountered in connection with such construction. In our estimation had Congress intended for the procedural provisions of the Miller Act to apply to Capehart contractors and their sureties it simply would have said so.

The interpretation which we place upon the 1956 amendment to the Act is in harmony with the administrative interpretation which has been placed upon it by the agencies charged with the implementation of the Capehart program. This is evidenced by the fact that the notice provisions in question, and certain other procedural provisions which differ from the procedural provisions of the Miller Act, were inserted in the bond forms by the agencies them-

[5] We have seen no case in which the question was actually presented for adjudication.

selves. It is settled, of course, that in the case of an ambiguous statute, and the 1956 amendment is ambiguous, the interpretation placed upon it by the agencies charged with its enforcement is entitled to great weight.

It may be argued plausibly that there should be general uniformity in the procedure required to be followed by Capehart suppliers on the one hand and Miller Act suppliers on the other. But, bearing in mind the differences between Capehart housing and more familiar types of Government construction, we do not know that absolute procedural uniformity is practicable, just, or desirable. Presumably, the agencies had some valid reason for prescribing dual notice as a condition precedent to action on a Capehart bond, although the record before us does not establish affirmatively what that reason was.[6]

The view which we take of the case renders it unnecessary for us to pass upon appellant's alternative contention that in any event its liability must be measured by the terms of the bond as written regardless of whether those terms should have been inserted in the bond. While **United States for Use of W. B. Young Supply Co. v. Stewart,** 8 Cir., 288 Fed. 187, the principal case cited by appellant in support of its alternative position, may be distinguished from the instant case, and while other relevant authorities appear to be in conflict,[7] the alternative contention is by no means frivolous in the circumstances here present. But, be that as it may, it is to be remembered that the only sec-

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[6] Whatever the reason for its existence, the requirement itself is neither unreasonable nor oppressive. There is no suggestion here that Capehart suppliers cannot inspect or obtain copies of Capehart bonds, and counsel for appellant stated without contradiction in the course of the argument that most of the suppliers of labor and materials for the Grand Forks project had in fact given the dual notice and had been paid.

[7] See 43 Am. Jur., Public Works & Contracts, § 147 and authorities there cited.

tion of the Miller Act referred to in the Capehart Act is the section which requires the giving of a bond; and when Congress said in the Capehart Act that the giving of a bond satisfactory to the Secretary of Defense or his designee should constitute compliance with the section of the Miller Act which requires that a bond be given, we think that the clear import of the language used was to take Capehart bonds entirely out of the Miller Act.

The judgment appealed from is reversed and this cause is remanded to the District Court with directions to dismiss the complaint.

Blackmun, Circuit Judge, concurring.

I concur, although somewhat hesitatingly. This case, I suspect, is a very close one. I fully appreciate the force of the plaintiff's posftion when it urges (a) the purpose of the Miller Act, namely, affording all suppliers a protection equivalent to that normally provided by state lien laws; (b) the liberal approach given the Miller Act (see, for example, **United States v. Aetna Casualty & Surety Co.**, 2 Cir., 1962, 297 F. 2d 665); (c) the *in pari materia* character of the Capehart and Miller Acts, and (d) the significance of the existing authorities, cited by the trial court and, in Judge Henley's opinion (to which might now be added **Gypsum Contractors, Inc., v. American Surety Co.**, N. J. Sup. Ct., May 7, 1962, 30 L. W. 2565), which, although concerned primarily with jurisdiction, at least inferentially lend support to the argument that the procedural provisions of the Miller Act are equally applicable to matters arising under the Capehart Act.

I am persuaded, however, by the agency practice; by the distinction between Capehart projects and other public works so far as direct use of government funds is concerned; by the apparently greater exposure to risk in Cape-

hart housing; by the feeling that the surety's obligation here should be measured by its contract, particularly where the rights of a non-party are concerned and where, as contrasted with the Miller Act, the statute is so unclear; by the absence of helpful material in the legislative history; and by the completely unexplained failure of this plaintiff to avoid his difficulty in the first instance by taking the small trouble to give the dual notice so clearly required by the bond.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.